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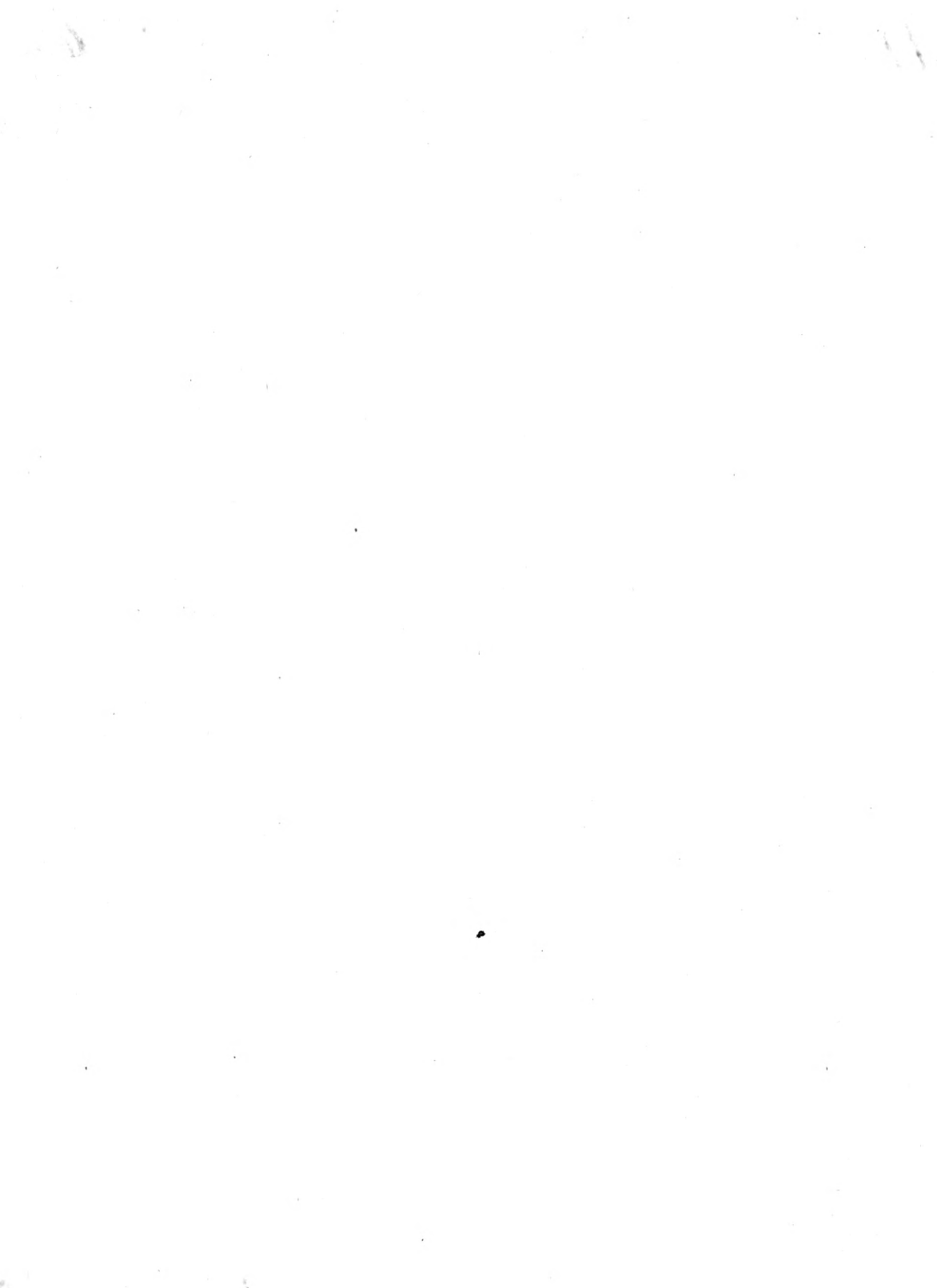
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John Adams

T H E
Orphan's Legacy :
O R, A
Testamentary Abridgment.

In Three Parts.

- I. *Of Last Wills and Testaments.*
- II. *Of Executors and Administrators.*
- III. *Of Legacies and Devises.*

W H E R E I N

The most Material POINTS of LAW relating to that Subject, are succinctly Treated, as well according to the Common and Temporal, as Ecclesiastical and Civil Laws of this Realm.

I L L U S T R A T E D

With a great Variety of Select Cases in the Law of both Professions, as well delightful in the Theory, as useful for the Practice of all such as Study the one, or are either Active or Passive in the other.

The Fourth Edition much augmented and enlarged.

By **JOHN GODOLPHIN, LL. D.**

Hebr. Chap. IX. Ver. 16, 17.

*Where a Testament is, there must also of necessity be the Death of the Testator.
For a Testament is of force after Men are dead : Otherwise it is of no strength at all
whilst the Testator liveth.*

L O N D O N :

Printed by the Assigns of *Richard and Edward Atkins, Esquires ; for
Robert Vincent in Cliffords-Inn Lane in Fleetstreet, 1701.*

I do allow of this Book, entituled, *The
Orphan's Legacy*, to be Re-printed
with the Additions.

Octob. 14. 1676.

F R A. N O R T H.

ADAMS 171.3

TO THE
READER.

THis *Orphan's Legacy*, not satisfied for want of *Typographical Assets*, it was held expedient to have recourse to a Second Edition ; which yet without some considerable Addition, would have been but a *Tautological Impression* : For prevention whereof many are the Law-Cases , not as meer *Mangonia*, on any *Bibliopolus* score, but as *Perutilia*, on the Publick Account, that by way of Augmentation to the former Edition are here super-added. The truth is, the Subject here treated of, is so voluminous in the Law, that without a due Limitation of the ensuing Tract, to what is only practicable with us in this Realm, the Readers hope would be forfeited, e're his expectation could be satisfied. Nor could this Treatise, though Testamentary, speak its Genuine and Native Language, because of that Incongruity of *Idioms* that is between reported *Precedents* at our Common Law, and Judicial *Decisions* at the Civil ; to which purpose a *Diallage* of Arguments might be produced. The Duel between *Meum* and *Tuum* is specially entail'd on the Families of such as *set not their House in Order*, but a right

understanding of the Testamental Laws, cuts off that Entail, whence the usefulness of this Treatise may be sufficiently visible to the darkest Intellects; there needs no further proof, where *Rei Evidentia* is in the case. And altho' the same be nigh as indubitable, as Death is unavoidable, yet in regard *Humanum est tam Errare quam Mori*, it is best Policy, though Plain-dealing, to acquaint the Reader, That all the *Errata's* of this ensuing Treatise, (as many as they are) refer only unto two sorts of Persons, the *Printer* and the *Author*. Thou art desired to correct the one, and pardon the other; who not pretending to any *Classical Privilege*, hath determined his Election, in chusing rather to lie at thy Mercy, than incur thy Censure.

PROLOGOMENON:
VEL
PRÆFATIO
AD
Lectorem Juris Studiosum.

Liceat & te alloqui. Conscripseram Anno jam bis elapso Libellum quendam Bimulem ; ad Jus Testamentarium pertinentem, quem paulo ante aliquot exemplaribus tam Juris (Anglice) Communis, quam Civilis & Canonici excudendum curavi : Ex quo tempore aliis occupatus negotiis, totam fere curam augendi dicti Libelli deposui, donec nuper otium per aliquot menses nactus essem ; quo tempore, ea qua jam antea excusa essent, obiter recognovi, eundemque Libellum jam auctiorem, multoque locupletiore reddidi. Et cum inter recognoscendum, pleraque non omnino omittenda (ut mihi videbatur) occurrerent, nolui, intermittere, quin & illa annotarem, & novis Paragraphis amplecterer. Qui quidem Paragraphi in eum numerum excreverunt, ut jam non tantum priori Editioni secundam, sed etiam nulli secundam de novo adjecerim. In his autem Institutum meum fuit, non aliena jam antea in lucem edita, interpolare, & pro meis venditare, sed ea potissimum in medium adferre, quæ forte ab aliis aut non satis lucide, aut nimis indigeste, sunt explicata. Qua in re magni Nominis Interpretum exempla, jurisque nostri Antistites celebriores secutus sum : Qui & ipsi, non contenti vulgari methodo, pleraque propria via, aliter quam ante ipsos ingressa fuerit, per quam celerrime ad propositum nobis in scribendo finem perveniamus, digesserunt.

In hoc Lucubrationum genere non alium magis quam veritatis & Publicæ utilitatis scopum semper propositum habui ; adeo ut totum hoc opusculum vix aliud est, quam Juridicialis quasi Expositio ad hanc rem pertinentis Locī Prophetici : Dispone Domui tuæ, hoc est, Conde Legitimum Testamentum, & singula dispone, ut hæredes & ministri tui sciant, quid post mortem tuam fieri velis : ita habet Lucas Osiander, Aulicus Concionator Wirteribergensis in suis Bibliis. Decet enim pium Patrem-Familias, ut ante mortem res suas sic disponat, familiæque suæ prospiciat (quoad ejus fieri potest) ne hæredibus Lites aut confusionem in Administratione Oeconomica relinquat. Non enim est alienum a pietate, rem domesticam ordinare, Testamentum condere vel conficere de secularibus negotiis, quo minus post obitum Lites emergant ob relictas divitias & Possessionum jura, atque ita ad moriendum, reddendamque Deo animam se componere ; ut autem moribundus sese eo alacrius ad hoc iter instruere possit, necesse est, ut anteres suas, quoad negotia domestica, opes, liberos, & alia diligenter curet atque integris adhuc viribus & sensibus ultimam suam voluntatem ingenue aperiat, Testamentumque quam opima ratione condat. Quoniam Dei ipsius mandato per Prophetam Regi Ezechix consentaneum est, ut quisque ante obitum suum Testamentum condat, & quibus hæreditatem suam conferri velit, decernat : Par est, ut homines fide digni, diligenti ejus habita ratione, nemini temere ultimam suam voluntatem irritam reddant, & Testamenta ab honestis hominibus præmeditate atque sano consilio condita obsignatave, non sine gravi ac pernecessaria causa rescindant & mutant. Requiritur enim a quolibet nostrum, ut moriturus aut graviter decumbens, mature Testamentum condat. Etenim, si Intestati moriamur, & res nostræ sint implexæ, plurima mala relinquimus hæredibus nostris. Proinde studium justitiæ & beneficentiæ, atque adeo ipsa pietas, jubent nos in tempore & mature, simulatque nos morbus aliquis invaserit gravior, rebus prospicere nostris. Et pertinet hæc cura communiter ad omnes Patres-Familias, ut morituri disponant Domibus suis, ne quis Posteris suis
vel

PRÆFATIO.

vel damni vel rixarum per negligentiam post mortem suam relinquat. Imo & in Casu hominis adhuc carentis prole tenet : Ita & Abram conquerebatur, dicens : Ecce ver- Gen. 15.
naculus meus hæres erit. Colligitur hinc, deficientibus Filiis, hæreditatem heredibus consignandam, ne qua inter illos suboriatur discordia. Ita Abraham Isaacum designavit heredem, Filiis autem Ancillarum adhuc vivis distribuit munera : Ita Jacob Patriarcha inter Filios varia Gen. 48.
disposuit ultimo Elogio, Josepho prælegatum dedit, & de funere suo cavuit. Adeo ut ab ipso Domino probari videatur, quod semper apud omnes homines usitatum fuit, nempe ut morituri mandata dent Propinquis aut Domesticis, atque de Familia sua constituent.

E quibus omnibus liquidissime apparet, ut Jus acquirendi res, sive dominia rerum Testamentariarum, per successionem sive ex Testamento, sive ab Intestato, primævo juri Gentium vel Naturali fere coætaneum, ejusque Disciplinam æque necessariam ; cujus Hypographia seu Hypothesis, vel speciali significatione quæstio finita, quam Controversiam vel Causam vocant Juris-Consulti, est Argumentum Tractatus subsequentis : Nolim tamen, in iis quæ a me tradita sunt, ita δόγματινός, ut aliis cedere nolim, quasi nullis rationum claustris me patiens coerceri, sed illa omnia, aliorum (apud æquos Lectores) permaturiori submisce relinquens judicio, hæc prælibare volui, quo gratiam tuam mihi conciliare valerem.

Vale.

T H E

The Chapters of the First Part.

- I. **O**F Testaments, Last-Wills, and Codicils in general.
- II. Of Testaments and Last-Wills more specially considered.
- III. Of Testaments solemn and unsolemn, according to the Civil Law only.
- IV. Of Testaments written and nuncupative.
- V. Of Testaments privileged and unprivileged.
- VI. Of Codicils.
- VII. Of Persons incapable of making Testaments.
- VIII. Of Persons Intestable by reason of the want of Discretion.
- IX. Of Persons Intestable for want of Freedom or Liberty.
- X. Of Women Covert.
- XI. Of Persons Intestable for want of their principal Senses.
- XII. Of Persons Intestable by reason of some criminal Convictions.
- XIII. Of Conditional Testaments.
- XIV. Of the several kinds of Conditions incident unto Testaments.
- XV. Of Testamentary Conditions in reference to Marriage.
- XVI. Of the manner of proceeding during the suspension of the Condition.
- XVII. Of Testaments void.
- XVIII. Of Testamentary Revocations.
- XIX. Of a Reviver of a Will or Devise revoked.
- XX. Of the Probat of Testaments.
- XXI. Of Proof requisite to a Will.
- XXII. Bona Notabilia.

T H E
Orphan's Legacy.

P A R T I.
Of Last-Wills and Testaments.

C H A P. I.
*Of Testaments, Last-Wills, and Codicils, in
 general.*

1. *Of the Antiquity of Testaments, and whether they had their Original from the Jus Gentium, or the Jus Civile.*
2. *What a Testament is: Also what a Last-Will properly is, and what a Codicil is; with their legal Differences each from other.*
3. *The use and end of Codicils: And whether an Executor may be appointed in a Codicil.*
4. *Six Inferences of Law from the Definition of a Testament.*
5. *In what sense the words [Testament and Last-Will] are Synonymous in Law, and wherein they differ.*
6. *The different Opinions touching the word [Testamentum.]*
7. *Whether a Seal, Subscription, or Subsignation, be necessary to a Last Will, or Testament.*

1. **L**ast-Wills and Testaments, as to their Use, End, and Substance (tho' not as to the Solemnities thereof) were known in the World long before Time had any one gray Hair; indeed, not long after the World came out of Nothing: For no sooner had *Omnipotency ex nihilo*, created a World of *All Things*; but some of these *All Things* fell, in the Infancy of Time, distributively into distinct Proprieties, proportionably, as that Blessing, *Gen. i. 28.* entailed on the Creation, took effect. *Propriety*, in Contra-distinction to *Community* could not originally be, until there was some in Being; not as Joint-Tenants, or as Tenants in Common, but as lawful Proprietors,

B distinct

distinct from *Adam's* concreated Dominion over all the Earth : Which not so much by any Right of *Primogeniture*, as by a *Deed* of *Gift* or free *Donation* he had, *ab initio*, a Legal Title unto, *Gen. 1. 26, 28.* Which afterwards in a Right Line of Succession, and by way of Augmentation to their Conquests in *subduing the Earth*, descended to his Posterity. Before which time, all things were, without Distinction, common to all, as living upon one and the same common Stock and Patrimony ; Yet afterwards by *Occupancy* (as those who inhabit Vacancies) chose their respective Territories in a way of *peculiar and private Dominion.* Which is the more conjecturable from *Abel's* having Sheep and Cattel, and consequently Pastures of his own : As also from *Cain's* having Plantations, and consequently Lands that were his own, and specially in the Land of *Nod*, where he built the City of *Enoch.* After this (as *Josephus* reports) came Exchanges, Buying, Selling, Weights, Measures, Judges of Covenants and Contracts, with Bounds and Limits of Land, into use and practice. And, when of all the Families on the Earth, only *Noah* with *His* appeared above Water, we find the Earth divided by his Posterity, some Ages after the Flood ; For by *Japhet* were the *Isles of the Gentiles* divided in their Lands, *Gen. 10. 5, 25.* *Cham* and his Posterity possessed themselves of the South and South-west parts of the World, as *Shem* did the East as far as to the *Indies.* It hath been also received by Tradition, That *Noah*, as by Command from God, received this kind of Distribution, or private Dominion, in the 930th year of his Age, being 300 years after the Flood, and confirm'd it by Will twenty years before his Death : And (according to *Eusebius* and others) delivered it a little before his death into the hands of *Shem* his Son and Heir. It is likewise evident from Sacred Records, That Wills and Testaments, and Donations *Mortis causa*, which are *quasi Testamenta*, were in use among the ancient *Hebrews*, *Deut. 21. 16.* Instances whereof we have not a few among the old Patriarchs, who conveyed their Estates from one to another in a way of Testamentary Alienations : Thus *Abraham*, if he had died without Issue Male, had made *Eliezer* his Heir or Executor, *Gen. 15. 2, 3.* which *Isaac* afterwards was ; *Abraham* having in his life-time dismissed his other Children only with *filial Portions*, *Gen. 25. 5, 6.* Thus *Isaac*, when *Esau* (like others of his Posterity) took a liquid way to disinherit himself, appointed *Jacob* as his sole Heir and Executor, *Gen. 27. 37.* who likewise in his Will bequeathed to his Son *Joseph* (over and above what he gave his other Children) certain Lands, which he got *jure Belli*, from the *Amorites*, *Gen. 48. 22.* Hence therefore it is very demonstrable, That Testaments and Last-Wills, as to their use, end, and substance, had their

Original-

Origination from the *Jus Gentium*, as the Product of *Jus Naturale*, which gave Being to that which we now call *Dominion*, or *Property*, and consequently to *Alienations*, under which *Genus* are comprized *Last-Wills* and *Testaments*, as a *Species* thereof, which notwithstanding have since received their Forms and Solemnities from the *Jus Civile*, (a) which requires seven Witnesses to a Testament, whenas the *Jus Gentium* is satisfied only with two. (b) In the Interpretation whereof, every Last-Will is a Testament: For which Reason, that Privilege of instituting Executors in Codicils, was not denied, in certain Cases, to such as were of the Military Profession. (c) So that as to the *Jus Civile*, there can no more of *Wills* and *Testaments* be ascribed thereunto, than the reducing them into several Forms, under the Qualification of certain *Solemnities*: And as to that part of a Last Will and Testament, which refers to the bequeathing of Legacies, it is evident, that the use and practice thereof was formally introduced by the Law of the Twelve Tables. (d) Thus Wills and Testaments, as to their *Substance*, are of the *Jus Gentium*: But as to their *Solemnities*, of the *Jus Civile*.

Bell. l. 2. c. 6. nu. 16. viz. Quamquam Testamentum, ut Aſtus alij, formam certam accipere poſſit a jure Civili, ipſa tamen ejus ſubſtantia cognita eſt Dominio, & eo dato, Juris Naturalis, &c. Alienatio autem in mortis eventum, ante eam revocabilis, retento interim jure Poſſidendi & Fruendi, eſt Testamentum. — Grot. ibid. & Gloſ. in l. 1. De Acquir. rer. Domin. & Bart. in Rub. De Acquir. hæredit. (b) Bart. in diſt. 1. interdum, nu. 7. & Barth. Romul. ſuper l. nemo poteſt, ff. de Legatum 1. un. 80. in Rep. D. D. Vol. 4. fo. 182. Et ut concluſum. Communitur D. D. in l. ex hoc jure, ff. de Juſt. & jur. & ib. per Jaſon. (c) L. Militia Codicil. de Militar. Teſtam. (d) L. verb. Leg. 12. Tab. de Verb. ſing. & Peter Criſ. ſuper Rub. de Legat. 1. nu. 47. in repet. D. D. Vol. 4. f. 4.

2. A Testament is a *juſt Sentence* of our Will, touching what we would have done after our death, with the Appointment of an Executor. (e) By exchanging the words [*juſt Sentence*,] into the words [*Lawful Diſpoſing*,] is given the Definition of a *Last-Will*: (f) Which (the Appointment of an Executor being omitted) defines a *Codicil*: (g) An Executor and a *Last-Will* or Testament are ſuch Relatives, as the one cannot be without the other. (h) Inſomuch, that although much be written in the name of a *Will*, many Legacies bequeathed, and ſeveral things appointed to be done; yet if no Executor be diſtinctly named, or the Office or Duty of ſuch perſonally and ſufficiently expreſſed or implied, it is no *Last-Will* or Testament. (i) Thus as a Testament is a *juſt Sentence*, ſo a *Last-Will* is a *Lawful Diſpoſing*, touching what we would have done after our death, with the Appointment of an Executor; and a *Codicil* is the ſame, but without ſuch Appointment of an Executor; which in truth is the very foundation of the Testament, whereof the nomination of an Executor, and the *juſta Voluntas* of the Teſtator, are the two main Eſſentials. (k)

Inſt. de Legat. & l. proxime. ff. de his quæ in Teſta. delent. Testamentum proprie dici non poteſt, ubi Inſtitutio hæredis abeſt. diſt. l. proxime.

(a) Licet Testamentum cum adjectione Solemnitatum, dicatur Jur. Civilis. L. 4. ff. de Teſta. ipſum tamen Teſtam. de ſe ſimpliciter, eſt de jure Gentium. Nam eo ipſo quod Gentēs eſſe ceperunt, diſponebant de Bonis ſuis poſt mortem. Ut legitur in Veteri Teſtamento de Antiquis Patribus. Bart. in l. 29. interdum. F. de Condiſt. ind. nu. 7. & Grot. de Jur.

(e) L. i. ff. de Teſt. & Inſt. de Legat. 8. an hæredis, & l. pen. ver. Galphrinus ff. de his quæ in Teſtade. (f) Mantic de Conjeſt. ult. vol. lib. 1. tit. 4. (g) Ibid. tit. 8. (h) L. 10. ff. de Jur. Cod. & Plow. Com. 185. in Woodward & Darcys, Caſe. (i) Inſtit. de hæred. l. 1. l. 2. ff. de Vulg. Subſtit. l. hæred. palam, ff. de Teſtamen. & Brook. tit. Executor. 20. (k) Ante hæredis.

(l) Lessius de just.
& jure l. 2. c. 19.
Dub. 1. nu. 3.
(m) L. Militis
Codicillis ff. de
Testa Milit. &
Glos ibid—
Militis Codicillis
ad Testamentum
factis, etiam Ha-
reditas jure dire-
cto videtur dari,
Licet focus sit in
Codicillis paganis.

3. A *Codicil* in the chief Construction, and Intendment of Law, is either for the Explanation or Alteration of something in, or for Addition of something to, or for Subtraction of something from the Testament. There is this further use also of a *Codicil*; and it hath this force in Law, That where-ever it is added unto a Testament, wherein the Testator declares, That he will have the Disposol of his Estate to be in force, either in way of a Testament, or Codicil, or whatever other way the Law allows: In that case, if the Testament to which such *Codicil* is annexed, afterwards prove, or happen to be invalid as a Testament; that is, as to the appointing or constituting of an Executor, yet it shall stand good as a Codicil; and accordingly be observed as *such*, by him who Administers to the same. (l) And altho' in a *Codicil* regularly Executors may not be instituted, or primarily appointed, saving only in the *Codicils* of Soldiers, by Law thereunto specially priviledged, and that only in certain Cases; yet even in *Codicils*, Executors may be substituted, or added, according to the Will and Pleasure of the Testator. (m)

4. From the precedent Definition of a Testament, the Legal Inferences are principally these six: *viz.* 1. That a Testator in his Will may not command or order any thing against Justice, Piety, Equity, or Honesty. 2. That it be full and perfect, without defect or imperfections, either in respect of Solemnity, or in respect of Will and Meaning. 3. That it ought to be advisedly and deliberately made, and not *Absque animo Testandi*.

5. That the Testator at the time of making the Testament, as he ought to be *Compos mentis*; so also to be *Sui juris*, in respect of what he disposeth in his Will. 5. That his Will be independent and Voluntary, or without the least circumvention, fear, fraud, flattery, coercion, or dependance on the will or pleasure of any other.

6. That the Testament being ambulatory in point of Will so long as the Testator lives, is not of any force or validity until his decease. (n).

(n) Heb. 9. 17.

7. A *Testament* is frequently called a *Will*, or *Last-Will*; for these words are commonly synonymous and promiscuously used: Yet the current Opinion is, That they understand them most properly, who limit a *Will* only to *Land*, and a *Testament* only to *Chattels*, requiring Executors, which a Will only for Land doth not require: For where Lands or Tenements only are devised by Writing, this according to the *Common Law*, albeit there be no Executor named, shall properly be called a *Last-Will*; and where it concerns only Chattels, a *Testament*. Such a Testament as where-to the Appointment of an Executor is essential, doth properly refer to Goods and Chattels; for Lands, by virtue of the Statute, may be devised by a Will in writing, where no Executor is named.

named. A *Testament* taken strictly, according to the Definition thereof, differeth from a *Last-Will*, (o) yet not as opposite thereto. (o) DD. post Gloss. but only as the *Species* differs from the *Genus*; for every *Testament* is a *Last-Will*, but every *Last-Will* is not a *Testament*. A *Last-Will* is a general word, and agrees with each several kind of *Last-Will's* or *Testaments*: (p) But a *Testament* properly so called, is only that kind of *Last-Will* wherein an *Executor* is appointed. in dist. l. 1. ff. de Testa. super tit. 5.

6. Whether the word [*Testamentum*] be a *Simple* or a *Compound* word? Whether *Simple*, as *Ornamentum*, *Instrumentum*, *Calceamentum*, *Paludamentum*, and the like; or a *Compound* of *Testatio* and *Mentis*, is not of any such cogent Interest, either to the *Theory* or *Practick* part of the Law, as to be much inquired into. Such as define *Testamentum* to be *Testatio mentis*, (q) seem indeed rather defective in the compleat Definition thereof, than mistaken in the Allusion to the thing they thereby aimed at: Nor are they duly reprehensible, who framing a genuine Composure of words, do only misexactly call it a Definition, when all their Design thereby, was only to allude to the main Essential of the Thing, rather than to adapt any adequate Definition thereof, specially where there is such a quadrate *Analogy* between the word, and such *Etymology* thereof, as to the thing signified thereby: And those few, who will not have it to be a Compound word, but *Verbum vel Nomen Simplex*, (r) seem therein to affect rather a singularity of Opinionative Contradiction, than any ways to Satisfaction, corroborate their Assertion by any Reasons or Proof, other than the *ipse dixit* of their own Authority: So that where we find it said, that *Testamentum* is *Testatio mentis*, it is to be understood in reference rather to the Etymology and Explication of the word, than to the Substance of the thing it self. (s) (q) Plowd. Com. & Instit. de Test Ord. § 1. Testamentum est Testatio mentis, & Covar. in Rub. de Testa Ord. ex 1 par. nu. 1.

Rub. de constitut. num. 126. ubi. Ista Etymologia est vera, sed impropria, quia non [cum heredis institutione] ut dicunt DD. in l. 1. ff. de Testa. & Aret. in l. 2. ff. de Legat. 1. (r) Aul. Gell. l. 2. c. 12. ad 8e v. Sulp. & Lau. Valla, l. 6. Elog. 6. c. 3.

7. Altho' the *just Will* of the Testator, and the Appointment of an *Executor*, be the very *Constituents* of a *Testament*, yet by the (t) *Civil Law* it was held but an *imperfect* Testament, unless it had the *Solemnities* of Sealing, or Signation, and Subscription of the Testator, and seven Witnesses thereunto specially required: And all this (except making the Testament it self) to be done at one and the same time; only with this *Salvo*, That in case the Testator were not *literate* enough to subscribe, then that defect might be supplied with an eighth Subscriber in his stead: (u) Provided, that no Testament *imperfect* by reason of signato, l. hac Consultissima. § non subscriptum. Cod. de Testa. (u) Testator nesciat Literas Octavum adhibere Testem. l. cum Antiquitas Cod. de Testamentis. (s) Theoph. Instit. de Testa. Ord. § 1. & Tholof. Syntag. jur. l. 4. c. 2. nu. 2. & Ant. Burgos in

such

such Solemnity, should run in prejudice to the Testators Children ; but that such *Imperfect Testaments*, whether *Written* or *Nuncupative*, should be good and valid as to them. (*w*) And although a *Seal* in Construction of Law, doth imply both a consent in him that affix'd it to the Instrument, as also a confirmation of the things therein contained ; (*x*) yet with us it is not necessary, though expedient to a Testament, which is not properly and legally a *Deed*, to which a *Seal* is essential, though it hath the force and virtue of a Deed : (*y*) Nor is the Testator's Subscription, which respects rather the Proof, than the Substance of the Testament, (*z*) absolutely necessary thereunto ; because upon other due and sufficient Proof, it may be good without it. So that a Testament may be valid, without either *Seal* or *Subscription*, because the *Substantials* (as aforesaid) of a Testament, do principally consist in the *just Will* of the Testator, with the *Appointment* of an *Executor*. (*a*) A Devise of Land, without Seal, or Name, or Mark, is good, if the Testator agree to it. (*b*) The Statute that impowers to make a Will of Lands, says nothing of Sealing, only it must be in Writing.

(*w*) L. hac consultissima. Cod. de Testa. & ibi glos. mag. & min. & l. qui Testamentum ff. de L. Cornel. de Falsis. Ubi in glos. min. Testamentum Scriptum ipso jure Nullum, si non sit signatum. Ibi in glos. min. in dict. l. & Sebas Montie. de Inventario. Q. 23. nu. 217.

(*x*) L. 2. Cod. de reb. alie. non alie. per Accurf. de Fidejuss. L. Lucius de Test. Milit. & in Writing. L. Tribunus. Sult.

(*y*) Offic. Exec. cap. 2. (*z*) Farinac. Decis. lib. 1. Decis. 45. nu. 4. (*a*) L. 1 c. de Testa. & Signor. de Homod. super l. si Ego. ff. de injusto rupt. Testa. nu. 31. (*b*) Perk 476, 477. March 206. Pl. 245.

C H A P. II.

Of Testaments and Last-Wills, more specially considered.

1. *Of the several Distinctions or kinds of Testaments, which the Law takes most notice of.*
2. *Of the Division of Testaments among the Ancient Romans, now of less moment in the Law.*
3. *The difference between Jus Gentium, Jus Civile, and Jus Canonicum, in reference to Testaments.*

1. **T**HE Distinctions of Testaments, which are the most obvious in the Law, are principally three ; with a threefold Subdivision to one Member of the last Distinction, as also to that, which for want of the Appointment of an Executor, may retain the name of a *Last-Will*, when it cannot properly be called a Testament, First therefore, *Testaments* are said to be either *Solemn* or *Unsolemn*. (a) This, though the first and greatest distinction of Testaments, yet of least force and use with us here in *England*. Secondly, Testaments are either *Written* or *Nuncupative*. (b) Thirdly, They are either *Privileged* or *Unprivileged*. (c) Of *Privileged* Testaments there are three sorts, whereof some are called *Military* Testaments, or such as are made by *Soldiers* under certain Qualifications : Others are such Testaments as are made only among the Testators own *Children*. And of the third sort, are such Testaments as are made to *Charitable* and *Pious* uses. But in case there be no Executor nominated or appointed, nor the Office of such personally and distinctly express'd, or sufficiently implied, then it may not properly be called a Testament, yet it shall retain the name of a *Last-Will*, which comprehends one of these, *viz.* either a *Codicil*, or a *Legacy* and *Devise*, or a *Gift* in regard, or by reason of death.

2. *Anciently* there were three ways of Testamentification, or three kinds of Testaments, whereof some are now totally laid aside, as obsolete, and quite of use ; others yet practicable, but in part only ; and others wholly retain'd in their full use and practice, though not with us, where the *Jus Gentium*, abstracted from superfluous Solemnities, in this matter prevails. One of these kinds of Testaments, was that which was made *Calatis Comitiis* in times of Peace : Another, that which was made in *Prociatu*, or in times of War, specially when about to engage the Enemy in fight. And the third, that which the Ancients called,

per

(a) Hac consuetudissima. Cond. de Testa. & l. 1. ff. de injust. rupt. & irrit. testa.
(b) Mynsing. Institut. de Testa. ordin. §. fin.
(c) Mantic. ubi supra, l. 1. tit. 57.

(d) Justin. in § 1. & 2 de Test. in Inst. Jur. Civil. Aul. Gel. l. 15. c. 17.

(e) Hoc cum eo quod nunc Militare appellamus aliquid habeat commune, sed cum eo idem non est, quippe quod illud sit multo Antiquius, etiam ante legem 12 Tal. receptum. --- Cal. Lex. verb. Testamenti, nu. 50. & Plutarch. in Coriola. cum aliis Just. § 1. de Testa. ordin. & Aul. Gell. ubi supra.

(f) Just. in dist.

§ 1. & Tholo. Synt. jur. l. 42. c. 3. nu. 3. in Titulis Ulpiani tit. 20. Illius Testamenti Solennitas apponitur in hæc verba, viz. in Testamento quod per Æs, & Libram fit, Duæ res aguntur, Familiæ Emancipatio, & Testamenti Nuncupatio, Nuncupatur Testamentum in hunc modum, Tabulas Testamenti tenens Testator, ita dicit, Hæc in his Tabulis cerisve scripta ut sunt, ita Lego, ita Testor : Quirites, vos Testimonium præbetote. Quæ Nuncupatio & Testatio vocatur. Ulp. c. Inst. 20. quod & ab Isidor. l. 5. Etym. c. 24. (g) Plin. lib. 33. cap. 3.

(h) Barth Romaleus super l. nemo potest. ff. de Legat. 1. nu. 87. in Reper. D.D. vol. 4. fol. 182. nu. 87.

(i) L. hac consultissima. Co. de Testa. ibi glos. mag. & min.

(k) Mant. le con. ult. vol. l. 6. tit. 3. nu. 9 in fin.

(l) C. relatum. de Testa. Anto. Burgos. in c. quæ Ecclesiæ. De Constit. nu. 203. in Reper. DD. Jur. can. vol. 2. fol. 151. nu. 208. & c. cum esset de Testa.

pes Æs & Libram. (d) That which was made in times of peace was done in presence of the *Roman* Assemblies, when conven'd together by the Sound of the Horn or Cornet, for the making of Laws, chusing of Officers, and the like : Testaments so made, were done with all their due Solemnities, whence they were called *Solemn* Testaments. Such as were made in times of War, specially when about to put themselves into a posture of War for actual Fight ; and before they girded on the Sword, they declared their Wills in the Audience of three or four Witnesses : (e) Whence it may probably be presumed, such Testaments were only *Nuncupative*. That which was called *Per æs & Libram*, was made only at the *Emancipation* of a Family ; and so called, because the Custom then was, to pay Money by weight : For at such Emancipations, the Testator did abdicate and renounce his Goods by way of a feigned and imaginary kind of Sale, to him whom he appointed for his Heir or Executor ; who by the Agency of a *Libripendent*, or Officer of the Ballance, did in the presence of five Witnesses, all to be of full Age, and Citizens of *Rome*, pay Money by weight, in consideration of such fictitious rendition. (f) Which Money in truth was no other than such Metal in the Bullion, or Mals, as was current among the Ancients to be paid by weight in all Matters of Alienation. (g)

3. The difference between the Law of Nations, the Civil and the Canon, in reference to Testaments, doth not respect so much the Substantials, as the Circumstantials thereof ; not so much the Substantial as the Probatory part thereof : Albeit there are that affirm, That by the Civil Law, the number of seven Witnesses, is the *Substantial Solemnity* of a Testament, (b) by which Law an eighth Witness is also required, in case the Testator be so illiterate, as not of Ability to subscribe his Name. By the same Law five Witnesses were required to a *Codicil*. All which were to subscribe their Names, and affix their Seals to the Testament. (i) By the *Jus Gentium* two Witnesses are sufficient ; (k) as also by the *Canon Law* in all Testaments to *Pious Uses*, and in such as relate to Matters merely *Secular*, three Witnesses ; whereof one to be the Minister of the Testator's Parish, or some other Ecclesiastical Person : (l) Which Practice of two or three Witnesses for the due Proof of a Testament (if without just exception) doth not only prevail with us, but as reformed by the Canon Law, and as warranted by

by the Law of God, and introduced by the *Jus Gentium*, doth (m) Mant. uti
now also prevail at the *Civil Law*. (m) sup. nu. 10.

C H A P. III.

Of Testaments solemn and unsolemn, according to
the Civil Law only.

1. *What solemn Testaments are, and why so called.*
2. *What the Law chiefly intends by Testaments unsolemn.*
3. *In what Cases unsolemn Testaments are tolerated by Law.*

1. **BY** the Solemnity of Testaments, is understood a certain Form introduc'd by the Civil Law, to this end, that the *just Will* of the Testator may not remain as a *Non Constat* after his decease: (a) The which Solemnity not being observed, the Testament is thereby rendered as imperfect and *null*. (b) So that by solemn Testaments, are here meant such Testaments as are made with all those Solemnities which the *Civil Law* requires: And they are principally these six; *viz.* 1. That the Testament be made *in scriptis*. 2. That the Testator do sign and seal the same. 3. That the Act of making and expediting the Will it self, be all done at one and the same time, saving only such Intervals, as the weakness of the Testator's Condition necessarily requires. 4. That the Testament be acknowledged as such, and published by the Testator in the presence of seven Witnesses. (c) 5. That all these Witnesses be thereunto specially called, requested, and required to be personally present for that very end and purpose. 6. That all these Witnesses do seal and subscribe the Testament so published as aforesaid, by the Testator in their presence. (d) All which Solemnities were required by the *Civil Law*, as almost essential to a Testament, though in truth some of them refer rather to the Probatory, than the Substantial part thereof. And hereof we have no use here in *England*, being not oblig'd to any of those Solemnities, (e) saving only to that *in scriptis*, when Lands or Tenements are devised.

nunt. Goth. in Not. ad l. 9. c. de Testa. (d) Tract. de Rep. Angl. l. 3. c. 7. & Lynw. Conf. c. Statut. verb. probatis, tit. de Testa. l. 3. & Bract. de Leg. & Conf. Angl. l. 2. c. 25.

(f) Mant. ubi fu-
pra. l. 6. tit. 3.
nu. 9. in fin.
(g) Stat. H. 8.
an. 32. c. 1.

Testamentum co-
ram duobus Testi-
bus factum apud
eas Gentes, quæ
solo jure Gentium,
non autem jure
Civili uruntur, *solemne* reputatur—Joan. Baptist. Sup. l. ut vim. ff. de just. & jur. in Re-
pet. DD. vol. 1. nu. 6.

2. *Unsolemn* Testaments, by the Intendment of Law, are no other than such Testaments as wherein the said Solemnities are wholly omitted : And such are our Testaments, not requiring above two sufficient Witnesses, in conformity to the *Jus Gentium*, and the *Canon Law* in that point; (f) and saving in a Devise of Land, as was said, wherein *writing* is also necessarily required, and that it be made in the Testator's Life-time : (g) Yet the Testator hath his liberty to make use of what other number of Witnesses he thinks fit, and may desire their Subscriptions; yea, for the better prevention of Fraud or Forgery, and *ad majorem cautelam*, may desire their Subscriptions to every Page of the Testament : But as to this the Law lays no Obligation upon him.

(h) Bartol. in l.
nemo potest. ff.
de Legat. 1. in
prin. & Alii qui
dicunt, hanc esse
Com. Opin. & in
L. hac consult.
Cod. de Testa.
(i) Barth. Romu-
læus sup. dict. L.
nemo potest. nu. 87
(k) Calv. Lex.
verb. Testamenti.
(l) Bart. in L. na-
turaliter nu. 25. de
Usucap. Gail. 2.
Obfer. Pract.

3. Altho' the *Civil* Law is so exact in requiring such *Solemnities* to the perfection of a Testament; yet even by that Law there are certain special Cases wherein *unsolemn* Testaments are not only tolerated, but also admitted and allowed for as good and effectual to all Intents and Purposes, as if they had been exactly circumstanced with all the Solemnities aforesaid; admitting therefore, that not only the just number of Witnesses, which the Law calls seven, but also their being specially and freely requested by the Testator to that end and purpose, with all the other Solemnities, were (as the learned *Bartol.* and others affirm) such Substantials of a Testament, as that without them it could not be a Testament at all: (b) yet inasmuch as the design of that Law, was not thereby so much to induce the Essence of a Testament, as to prevent such Deceits and Frauds as are incident thereto, (i) it doth validate all priviledg'd Testaments, such as Military, *Inter Liberos & ad Pios usus*, notwithstanding their defect of such Solemnities, as effectually as any *solemn* Testaments whatever. To which may also be added, such Testaments as are made or published in the presence of the Prince, or Supreme Magistrate, (k) as Supplementary to all Defects of Legal Solemnities : And likewise such Testaments as are made in Times when, and Places where the Plague or Pestilence doth rage; such being compared to Military Testaments, in that God at such times seems to proclaim War against Men. (l)

Quem refert. 108. nu. 108. Tempore Pestis relaxatur Solennitas—Bar in l. unic. ff. de bon. Posses.

C H A P. IV.

Of Testaments Written and Nuncupative.

1. *Testament written, what ?*
2. *Difference between Devise of Lands and Bequest of Goods.*
3. *Lands of Burgage Tenure, and by Custom devisable, may pass Nuncupatively.*
4. *Naming Executor not necessary in a Will only for Devise of Lands.*
5. *Notes taken in writing sufficient for devise of Lands.*
6. *Testament Nuncupative, what ?*
7. *The Will whether Nuncupative or Written, in case the Executors Name be omitted out of the Writing ?*
8. *Law-Cases relating to this Subject.*

1. **A** *Written Testament* is such, as at the time of making thereof is committed to writing. (a) By which words are excluded such Testaments as are afterwards put into writing : For being first made by word of mouth, they still remain *Nuncupative*, notwithstanding the reducing thereof into writing after the Testator's Death. (b) Among other Advantages that a Testator hath by a *written Will*, this is one, that he may conceal the Contents thereof from the Witnesses, (c) which in a *Nuncupative Will* he cannot do. And it is sufficient, if taking his Will in his hand, he say unto the Witnesses, This is my Last-Will and Testament ; or herein is contained my Last-Will ; or other words to the like effect. (d)

2. As touching the disposition of Land of Inheritance by Will, if it be not fully written before the Testator's death, so far at least as concerns the disposition of the said Land, it may not be for that part made good by reducing it to writing after the Testator's death ; but as touching Goods and Chattels it may. (e) Nevertheless, if it be written before the Testator's death, tho' it be never brought nor read to him after the writing thereof, yet it is good enough ; and that not only for Land, but also for Goods and Chattels, provided that there be an Executor named. (f) And this shall be a Will in writing, and not verbal only, yea tho' it want the Subscription of the Testator's Name : (g) For many cannot write at all, and some want Hands : Nor is the subscribing the Name of the Maker, any essential part of the Deed, much less of a Will, which needs not sealing as a Deed doth.

3. Lands and Tenements devisable by Custom, may pass by a *Nuncupative Will* for any time whatsoever ; for in a Devise of

(h) Swinb. Part 1.
§ 11. n. 5.

(i) Stat. H. 8. an.
32. c. 1.

(k) Aymon Cra-
verte super Rub.
de Legat. 1. in
Repet. DD. vol.
4. fol. 26. nu. 33.
Bald. in L. & in
Epistola Col. 2.
Cod. de Fidei-
com.

(l) § Ante hære-
dis, Inst. de Le-
gat. & § in primis.
Inst. de Fideicom.
hæred. & L. pro-
xime § penult. De his quæ in Testa. delent. (m) L. Assé toto, ff. de Hæred. Instit. & l. Institutio, ff. de Condit. Instit. & Jac. Mandellus, Super l. 1. ff. de verb. Oblig. in Repet. DD. vol. 6. fol. 176. nu. 51.

(n) Dyer in Case
inter Sackville &
Brown.

(o) Ibid. sup. ult.
vol. cujusdam
Hanton.

(p) L. nutu. in
prin. de Legat. 3.
& Barr. in l. 1.
§ 1. ff. de verb.
oblig.

Lands, Tenements, and Hereditaments, held in Burgage tenure, it is not necessary that the same should be written, because such may pass sufficiently by Will *Nuncupative*, (h) because such Lands were devisable before the making of the Statute of H. 8. enabling to devise Lands, Tenements, and Hereditaments by Will in writing in the Testator's Life-time, which cannot pass by a *Nuncupative* Testament or Will without writing: (i) So that Lands of Burgage-tenure, and by Custom devisable may pass Nuncupatively, tho' Lands of other Tenures are not devisable but by Will in writing.

4. Tho' the naming or appointing of an Executor be essential to constitute a Testament or Last-Will, yet this properly refers only as to Goods and Chattels; for a Man may by his Last-Will in writing devise his Lands, Tenements, and Hereditaments, tho' he make no Executors, because an Executor hath nothing to do with the Freehold of Land. And this is more properly a Last-Will than a Testament; for a Testament, in a proper and strict sense, is taken for the Institution or Appointment of an Executor: And when it is taken only for *Testatio mentis*, or the Witness-bearing of a Man's Mind or Will, it cannot be termed a Testament otherwise than improperly, and in a large sense: (k) For Contracts, and other Transactions, may be the Testation of a Man's Mind and Will, as significantly as Testaments: And therefore whatever Instrument *in Scriptis*, or Nuncupation *in Verbis*, be made in the Name of a Testament, it is (as such) null and void, if there be no Executor appointed: (l) Only a Testament may (as such) be valid and good, without the express institution or Appointment of an Executor therein, in case the Testator, touching such Institution or Appointment, distinctly and positively refers himself therein to some other certain Writing made by him. (m)

5. If the Writer doth only take Notes from the Mouth of the Testator of his Last-Will, for the Devise of Lands, Tenements, and Hereditaments, and afterwards write the same, but the Testator dies before it be shewed unto him; yet this is sufficient for a Will in writing, for the conveying of Lands, Tenements, and Hereditaments, (n) Likewise it is sufficient, if Notes or Articles be made and read to the Testator, though the same be not ingrossed at large, or in form of Law, until after the Testator's death. (o) Also a Testator, who by reason of some weakness or infirmity, hath totally lost his speech, may yet even by signs or nods, bequeath what Legacies (Lands excepted) he pleases. (p) Yet note, that by such signs or nods, he may not appoint an Executor; for that can only

only be done either *Nuncupatively*, or *in Scriptis*, and not otherwise. (q) And altho' it hath been received as a common Opinion, That in the Case aforesaid, Legacies may be bequeathed only by nods and signs; (r) yet there are, and that of Orthodox Authority, who affirm, That the Law which introduc'd that Practice, is since repealed or corrected by a later Law. (s) Notwithstanding which, if the Testament be to Pious Uses, or *inter Liberos*, though made at the Interrogation of another, only by nods and signs, the validity thereof is not on that account to be disputed. (t)

(q) Angel. de Testa. Gloss. 14. § 1. in prin. in Tract. DD. Vol. 2. fol. 33. nu. 1.

(r) Angel. a Samb. ubi sup.

(s) Per L. discretis Cod. qui Test. fa. poss. in fin. conjuncto prin. Secundum Rapha. in L. 2. ff. de Testa.

sta. & ad L. nutu. & l. si quis in fundi, de Legat. 1. (t) Joan. Crottus super § si quis ital. ff. de verb. Oblig. in Repet. DD. vol. 6. fol. 91. nu. 14.

6. Testaments are called *Nuncupative*, when the Testator without any writing, doth declare his Will before a sufficient number of Witnesses; (u) and such *Nuncupative* Will is of as great force and efficacy (except for Lands, Tenements, and Hereditaments) as any written Testament. (10) Yea, this verbal, oral, or *Nuncupative* Will, being after the Testator's death reduced to writing, and having the Court-Seal affixed thereunto, is of as good validity touching the disposal of Goods and Chattels, as if it had been written in the Testator's Life-time. (x) Such *Nuncupative* Testaments are supposed to be of the greatest Antiquity, and far more Ancient than *written* Wills, as being in use and practice before *Letters* were known, whereby to explicate the fence of our minds by any distinct and significant words *in Scriptis*. Pliny ascribes the first Invention of *Letters* to the *Affyrians*: But if we will believe *Aulus Gellius*, they were first invented by *Mercurius* among the *Egyptians*, from whom *Cadmus* (who lived *A. M.* 1507. which was the first Sabbatical Year) convey'd that Art out of *Phanicia* into *Greece*, whence the *Grecians* brought the first use thereof into *Italy*: But long before this were Wills and Testaments, as to their use, end, and substance, practically known among the Patriarchs; which by necessary consequence could not be other than *Nuncupative* Testaments.

(u) Inst. de test. ordinan. § fin. & l. hæredes. ff. de testa.

(10) L. hac Constat. § per nuncupat. C. de testa.

(x) Stat. 14 H. 6. 5. & 5 H. 5. & 1 M. 15. & 16 El.

7. Although many Legacies be made and written in a Will, and many things expressed to be done, yet if no Executor be named in the writing, only *A.* and *B.* by word of mouth appointed to be Executors; this shall not amount to a Will in writing, but to a *Nuncupative* Will only; (y) because one essential part of the Will, (*viz.* the appointing of an Executor) is omitted out of the writing. Nay, the appointing of him Executor, who is named in such a Note left with *C. D.* is no sufficient making of an Executor at all. (z) Nor is the appointing of any one by a doubtful and uncertain name, a sufficient making either of an Execu-

(y) Offic. Exec. ubi sup.

(z) Sum. Silv. tit. de test. fol. 443. 6.

(a) *Inst. de Legator or Legatary, (a) unless some other sufficient Circumstance doth*
tis § incertis. make it plainly appear whom the Testator meant ; so tender and
 cautious is the Law of fixing the Interest of any upon mere Doubts
 and Uncertainties.

8. A Man took Notes of a Will of one who lay sick, and afterwards he drew up the Will in writing, but the sick Person died before it was shewed to him : Yet it was the Opinion of the whole Court, that the same was a good Will within the Statute of 32 H. 8. to convey Soccage Land, *Trin. 6 E. 6. Dyer 72.* So was it adjudged in 4 & 5 *Eliz.* in *Hinton's Case*, where Articles were read to the Devisor, concerning the disposition of his Lands, and the Articles were written and engrossed after his death ; and yet it was a good Will, within the said Statute of 32 H. 8.

Hugh. Abridg.
 verb. *Wills and*
Testaments.

A Man intended Land to *J. S.* for Life, the remainder to *J. D.* and before the remainder was written, the Devisor died. It was the Opinion of the Court, that the same was a void Devise for the whole Lands within the Statute of 32 H. 8. because that the one did depend upon the other : But in that Case it was holden, that if a Man seised of two Acres, intends one of them to *J. S.* and the other to *J. D.* and the Devise to one is written, but the Devisor dieth before the Devise of the other Acre to the other is written : It is a good Devise for the Acre which is written, but not for the other Acre.

Trin. 11 Jac. in
C. B. Caesar and
Lake's Case, ad-
judged acc. Hugh
Abridg. Ibid.

B. brought a Writ of Entry, in nature of an Assize, against his Father's Wife. The Case upon Evidence was this, *viz. H. B.* the Plaintiff's Father, and Husband of the said Wife, being sick at *London*, sends for *A.* desiring him to write the Last-Will and Testament of his Lands. *A.* desires *B.* to declare, what he would have his Last-Will and Testament to be, and who to be his Executors ;

Brown & Brown's
Case. Mich. 4 & 5 P.
M. Anderf. Rep.
Case 85.

Chattels & Leases
 for Years of Lands,
 may be devised by
 word without any
 Writing—
Plow. 345. Dyer.
140.

whereupon *A.* wrote short Notes of his Last-Will, and every Legacy, and who should be his Executors ; then return'd to his own House, there wrote the said Will in Order and Form, and therewith returning to the House of *H. B.* within half an Hour after 12, intending to have read the same unto him, was then told, That the said *H. B.* died at Twelve of the Clock just before. Whereupon *A.* delivered the same to the Executors that were therein named. The Wife enters on the Testator's Tenements, and what was devised to her : The Son enters upon her, the Wife re-enters, whereupon the Plaintiff brought his Writ. The Opinion of all the Justices was, That it was a good Will in writing, according to the Statute of 32 H. 8. and declared their Opinion on the Evidence given ; whereupon it passed for the Wife, and she enjoy'd the Land.

A Will made by one in his Sickness, at the Importunity of his Wife, and for Quietness-sake, and to be freed from her vexatious

tious Sollicitations, shall be interpreted as made by Constraint, and consequently not good.

If a Testament be found written in the Testator's House, but not known by whom, if this Testament be read to the Testator, and approved by him, it is good.

A. commands B. to write his Will, and therein to devise to C. and his Heirs, the Mannor of D. upon Condition, &c. After the writing of the Devise, but before the writing of the Condition A. dies, the Will is void by reason of Imperfection. Co. 2. 31. 4. 60.
Dyer 72. 53.
Brownl. 1. 44.

A Man lies sick, his Voice is weak and low, he desires to have his Will put into writing: The Writer sits at a Table somewhat distant from the Bed wherein the sick lies, and does not hear what the sick party speaks, but takes his words from another that stands nigh to him, and none others then present that can prove he told the Writer the very words of the sick party: This Testament will not be good for the devise of Land. Co. 3. 31. 32. 4. 60.
Dy. ubi supra,
Plow. 345. 32 &
34 H. 8.

A Man being nigh the point of death, deviseth his Land by word; another standing by, does without his privity, knowledge, or consent, immediately put this into writing before such Devisor died: This is held a good Devise of the Land. Leon. 3. 79.

For a Devise of Fee-simple, it is not sufficient to put it into writing after the Testator's death: But if when by word the Testator declares his Mind, he doth withal appoint the same to be put into writing, and it be done accordingly in his Life-time, it is as good a Testament and Devise of the Land, as if it had been written at the first. So also is it, if it be written from his mouth according to his mind, and his mind were to have it written, albeit it be not shewed or read to him afterwards. Co. 4. 60. 3. 31.
Perk. Sect. 476.
Dyer 72. 63.
Plow. 345.

One gave Instructions to have his Will made in writing, and to give his Lands to one of his Sons *for Life*; the Writer mistook, and made a Devise of it in Fee: And it was held utterly void, and that it did not pass it for life. Co. 3. 31.
More. Case 483.

C H A P. V.

Of Testaments privileged and unprivileged.

1. *Testaments privileged, what ; and how many kinds thereof.*
2. *Military Testaments, their Privileges and Antiquity.*
3. *Testaments made in favour of the Testator's Children, their Privileges.*
4. *Testaments made for Good and Pious Uses, their Privileges.*
5. *Testaments unprivileged, what.*

1. **T**ESTAMENTS *privileged* are such as are qualified by some special freedom or benefit, contrary to the common Course of Law ; (a) or by some special freedom are discharged from the usual Requisites and Observations of Common and General Law : Whereof there are (as in the second Chapter) chiefly these three kinds ; viz. 1. Military Testaments. 2. Testaments made in favour of the Testator's Children. 3. Testaments for Good and Pious Uses.

2. The *Privileges of Military Testaments*, or of a Testament made by a Soldier are many, but chiefly these four, viz. 1. A Soldier is not disabled from making his Testament by any of those Impediments which disable others, unless for want of Reason, or other like grand Causes whereby he is disabled *Jure Gentium*. (b)

(1) Mynf. de Milit. Test. in pr. 2. Whereas divers Persons are prohibited from being Executors or Legataries to other Persons, yet the Law doth not so prohibit them from being Executors or Legataries to a Soldier, save in some very few Cases specially limited in the Law. (c) 3. Soldiers are clearly acquitted from the Observation of the Solemnities of the Civil Law in making of Testaments. (d) 4. Whereas no other Person can die with two valid Testaments, yet a Soldier may, and both Testaments shall stand good according to the intent or meaning of the Testator. (e) † Other Privileges there are peculiar to Soldiers in making their Testaments, but they being many, (f) it would not answer the Design of a *Compendium*, to make a specification thereof. Only let it not here escape our Observation, that these Privileges belong only to such Soldiers as are in Expedition, or actual Service of War, (g) and not to such as lie safely and securely in some Castle, Garison, or other like place of Defence. (h) These Military Testaments began under the Emperors,

(c) Bart. in dist. tit. (d) L. Divus ff. de mil. test. § plane. Inst. eod.

(e) L. quærebatur, ff. eod.

† Testamentum Militis irritum, facilius convalescit quam Pagani l. 23. § 2. ff. de Milit. Testa.

(f) Vassq. de success. resol. lib. 2. § 20. ubi enumerat 70 Privilegia militibus indulta.

(g) L. pen C. de test. mil. & Mant. ubi sup. l. 6. tit. 1. nu. 32. § sed hæcenus. Inst. de mil. test. & Gail. Obs. 118. (h) Mynf. §. illis autem. Inst. de mil. test. & Jul. clar. § testament. q. 15. in fin. Olim ante Justinianum hoc Privilegium Commune erat Militibus omnibus, sive in Expeditione, sive extra eam essent, sed Justinian. restrinxisse illud videtur ad Milites eos qui expeditione degere. l. pen. c. de Test. Milit. Non igitur omne Testam. Militis est Testam. Militare.

and

and are not the self-same which the Law anciently termed Testaments *in Procinctu*, whereof mention was formerly made, *Secſt.* 2. c.2. For such Testaments made *in Procinctu*, were far more ancient than what we now understand by Military Testaments, yea before the Law of the Twelve Tables; therefore long before the time of the Emperors, under whom these Military Testaments had their Original, known to the Law by a peculiar Appellation of *Testamentum Civile Imperatorium*, because they were introduced by the Constitutions of the Emperors: For after that such Testaments made *in Procinctu* began to grow obsolete and out of use, and a freedom or liberty of Testamentification, so extensive would then no longer be permitted (which yet afterwards was again introduc'd) *Julius Caesar* by way of special Privilege to his Soldiers, granted them a power to make their Wills and Testaments with all freedom; that is, exempt from, and discharged of those Solemnities, which by the Civil Law were in the Testaments of all others to be performed and observed; which Privilege the succeeding Emperors did afterwards ratify and confirm: (i) And these are they, which (i) L. 1. ff. de Testa. Milit. under this Head of Privileg'd Testaments, may properly be understood as Military, in Contruction of Law.

3. The Privileges of Testaments made in favour of the Testator's Children, are chiefly these three, *viz.* 1. If two Testaments be found after the Testator's death of divers Tenures, and it appear not which of them is the latter Testament: In this Case that shall be presumed the latter, and so prevail, which is made in favour of the Testator's Children (k) 2. The Testament made in favour of the Testator's Children, is not so easily revoked as possibly other Testaments may be. (l) 3. A Father's Testament among his Children shall take effect, though there be no Witnesses to prove the same, being written or subscribed by the Testator's hand, or by him procured to be written by some other. (m) However these two last Privileges by the Custom of *England*, the latter of them especially, are common to all *English-mens* Testaments; in which also are all other Privileges which the Law doth indulge to such Testaments *inter Liberos*. (k) Bart. in l. 1. § 1. de bon. poss. secund. Tab. ff. Clar. § testa. p. 100. (l) Auth. hoc int. Liberos, cod. de Testa. & Glof. ibid. (m) Bald. Paul. de Castro & Jaf. in Auth. Quod sine C. de Testa.

4. The Privileges of Testaments made for Good and Pious Uses (being such as are made to Orphans, Widows, Strangers, Prisoners, lame and diseased Persons being poor and indigent, to Churches, Hospitals, Schools, Colleges, also for the Redemption of Captives, repairing of City-Walls, Bridges, and such-like) are chiefly these four, *viz.* 1. This kind of Testaments may be written with strange and unaccustomed Characters, yet shall be good and effectual. (n) 2. If the Testament *ad Pios usus* be found cancelled, and it be not known whether the Testator did willingly cancel the same, the Law presumes it to be unadvisedly cancelled, where- (n) Mant. ubi sup. l. 6. tit. 3. n. 2. & Tyrrel. de Privileg. pia. Caus. c. 12.

as in other Testaments the contrary is presumed; but in this kind of Testaments *ad Pios usus*, if it be not certainly known that the Testator did wittingly cancel the same, it shall be in effect as if it had not been cancelled at all. (o) 3. In this kind of Testaments it is sufficient that the Condition (if any be) be observed and accomplished by other means, than according to the precise form of the Condition. (p) Whereas in other Testaments or Legacies, it is not sufficient, unless the Condition be precisely observed. (q) 4. The Testament *ad Pios usus*, is not void, in respect of uncertainty, as other Testaments are. (r) And generally most Privileges that do belong to other privileged Testaments, do belong also unto this Testament *ad Pios usus*; whereof the Law takes notice of three degrees more especially: The first is, when any thing is bequeathed to the Church, for the sole use and benefit of Persons Ecclesiastical, being reckoned among those Cases which the Law calls *Favorabiles*. (s) The second Degree is, when Bequests are made for the Vessels, Utensils, and Ornaments of the Church, relating immediately to the Worship and Service of God: And this is a Degree in Construction of Law more *favourable* than the former. (t) The third Degree is, when Legacies are bequeathed for the Redemption of Captives: And this Degree is preferred before both the former, as the highest Degree of all Pious Cases in the Eye of the Law: For which Reason, the Emperor *Justinian* did call it *Causa Piissima*. (u) Inasmuch, that both by the Civil and Canon Laws, the Vessels or Utensils of the Church, and other Consecrated Things dedicated to Sacred Uses, may be lawfully alienated for the Redemption of such Captives. (10)

(o) Covar. in Rub. deref. part 3. nu. 19. & Mant. ubi sup. l. 12. tit. 2. n. 32
(p) Tyraq. ubi sup.
(q) L. Mævius & l. qui hered. ff. de cond. & dem.
(r) Barr. & Jason. in l. 1. C. de Sacros. Eccl. & Graf. Thef. Com. Opin. § Instit. q. 12.
(s) In cap. ex part. de Testamentis, & Hiero. de Cavallos. Pract. Quæst. Tom. 1. q. 126. nu. 3.
(t) Cap. fin. de Testa. & l. Titia. § Scia ff. de aur. & argent. Legat.
(u) Glos. verb. excipimus, in Authen. de Restitut. §. Si vero in Redemptionem, & in Authen. Ut cum de Appellatione cognoscitur. §. Si unum de prædictis. colum. & Tyraq. post. Leges Connubiales. Gloss. 3. nu. 286. (10) In cap. Apostolicos, & in cap. Sanctorum. 12. q. 2. l. Sancimus. Cod. de Sacrosanct. Eccles. Authen. de Alienatione Emphyteusis. §. Sanctissimos verb. de Sacris autem vasis.

5. Testaments *unprivileged*, are such as have not any benefit or freedom above, or contrary to the common course of ordinary Law, but are generally obliged to the Observation of such Requisites as the Law regularly appoints for all Testaments.

C H A P. VI.

O F C O D I C I L S.

1. *The Etymon and Original of the Word.*
2. *The Definition of a Codicil.*
3. *Codicil may be made with, or without writing, before or after the Testament.*
4. *Who may make a Codicil ; and whether more Codicils than one may consist together.*
5. *The Division of Codicils, and what Proof requisite thereunto.*

1. **A** Codicil in the Etymology thereof, doth signifie a little Book, *Codicillus* being but the Diminutive of *Codex*: You may, if you please, call a Testament a great Book, and a Codicil a little Book or Writing. The Original of these Codicils was merely occasional ; for when by reason of the multiplicity of Legal Solemnities requisite to a Testament, which are not so to a Codicil, the Testator failing of sufficient opportunity to make a Testament solemn, was enforced to fly to the refuge of a Codicil for declaration of his Will to be performed *post mortem* : Or otherwise as additional to the Testament, touching something therein omitted ; or explanatory to it, touching something therein ambiguous ; or derogatory to it, touching something therefrom to be detracted.

2. Every Man that writes of this Subject, abounds in his own Sense touching the Definition of a Codicil ; but he will be found least in Error, who defines a Codicil to be the just Sentence of our Will, touching that which we would have done after our death, without the appointing of an Executor. (a) Yet here observe, that the word [*Fuß*] is not so comprehensive in this Case as in the Definition of a Testament ; for here it doth not signifie those Solemnities and Ritual Formalities which are Testamentary, but only an exclusion of Illegalities, and inclusion of such Perfections as are consistent with the nature of a Codicil : so that we may not improperly infer, That a Codicil is a kind of an unsolemn Last-Will. (b)

3. A Codicil may in effect be made either in writing, or without it, (c) provided you do not call it a Nuncupative Codicil, that being an abuse of words ; for if a Codicil may, as aforesaid, be called a little Book or Writing, it is improper to call it a Nuncupative ; therefore although all the power and force of a Codicil may be made without writing, yet being so made, it may not otherwise

(a) Mantic. l. 1. tit. 8.

(b) Graf. Thes. Com. Op. § Codicil. in prin.

(c) Gloss. in Rub. c. de Codicil. & Minfing. in dict. Rub. Instit. & Wesemb. in ff. de jure Codicil.

(d) L. conficiuntur in prin. ff. de jure Cod. & §. non autem Inst. de Codicil.

(e) L. confic. ib.

(f) Vigel. meth.

jur. Civil. part 4.

l. 9. c. 23.

(g) Mynsing. post. gloss. in §. non tantum. Inst. de Codicil.

(h) Bart. & alii in l. 2. de Legib. 1. & Graf. Thef.

Com. Op. §. Cod. nu. 2.

(i) L. Cum proponat. Cod. de Codicil.

(k) Glof. & DD. in dict. l. cum proponat. & Graf. Thef. Com. Op. §. Codic.

(l) § Non tantum Instit. de Codicil.

(m) Didac. Spin. in Spec. Testam. tit. de Fideicom. substit. nu. 50.

(n) De Prætis, l. 2. int. 1. Dub. 1. Sol. 10. nu. 1. l. 1. Cod. de Codicil. & l. 1. § hoc interdictum. De Tab. exhib. & Accur. in l. Militis. de Testa. Milit. & l. 5. § qui principale. De his quib. ut indignis. inter pr. Testam. ad 3 part. Rubricæ. nu. 21.

wife than improperly and abusive, be termed a Codicil, but rather something *Loco Codicilli*, and which hath the full force and effect of a Codicil. Also a Codicil may be made as well by him who dieth Intestate, as by him who dieth Testate. (*d*) Neither is it material whether it be made before or after the Testament; (*e*) for in both Cases it shall be reputed as part and parcel of the Testament, (*f*) and to have equal force with it; unless being made before the Testament, it be revoked in the Testament, or be contrary to what is contained therein. (*g*)

4. Persons capable or incapable of making Testaments, are even such also as to Codicils. (*b*) Yet a Man may die with divers Codicils, and the later shall not (as in divers Testaments) null the former, so as the one be not contrary to the other. (*i*) And if in such Codicils (it not appearing which was first or last) one and the same thing be given to one Person in the one, and to another Person in the other, the Codicils are not void, but the Persons therein named ought to divide the thing equally betwixt them. (*k*) He that makes no Will, may yet make as many Codicils as he please. *Litt. Sect.* 168. & *Perk. Sect.* 478. to be annexed to the Letters of Administration, and to be performed by the Administrator. To a Will in Writing may be added to a Codicil by Word without Writing: Which Parol-Codicil may after be put into Writing, and affixed to the Will. *Styles Regilt.* 357.

5. The Civil Law makes some Divisions of Codicils, as well as of Testaments, which do not much concern us in point of Practice; only it may not be omitted, That Codicils may be made as well by those who die Intestate, as by those who make their Testaments. (*l*) And Legacies may be bequeathed in Codicils even by Intestates. (*m*) There are also Codicils which are confirmed expressly in the Testament, and wherein mention is made thereof for their stronger Corroboration: And there are others only annexed to the Testament, and whereof the Testament it self takes no special or particular notice, yet are confirmed by the Law: For the Law in certain special Cases (as in the Appointment of Guardians, Matters of Trust, and the like) doth distinguish Codicils confirmed by Testaments, from Codicils merely annexed to Testaments. (*n*) And albeit with us here in *England*, who in this Point conform to the *Jus Gentium*, Codicils require a Proof equal to that of Testaments; that is, two Witnesses without Exception; yet by the Solemnities of the Civil Law, only five Witnesses are required to a Codicil, (*o*) as seven to a Testament, saving to such Codicils as are annexed to privileg'd Testaments: In which Case two Witnesses are alike sufficient to the one as to the other. (*p*)

(*o*) Graf §. Codicillus. q. 1. l. ult. Cod. de Codicil. (*p*) Covar. tit. de

C H A P. VII.

Of Persons incapable of making Testaments.

1. *That the making of Testaments falls under a double Consideration in Law.*
2. *That the Law touching such as may be Testate is Prohibitory.*
3. *What Persons they are, who are incapable of making Testaments, and for what Reasons.*
4. *Whether Kings and Sovereign Princes may make their Testaments, and of what.*

1. **T**HE making of Testaments is in Construction of Law twofold ; the one Active, the other Passive : By the Active is meant or intended, that Power or Legal Right, which any capable of making Testaments, have to ordain the same : By the Passive is to be understood, that Legal Capacity which any have to be appointed or constituted Executors, or General Legataries ; for without this later, the former can have no being.

2. The Law touching such as may be Testate, or Testable, is Prohibitory ; that is, every Person regularly hath full Power and Liberty to make a Testament, or Last-Will, ^(a) and therein may dispose of his Goods and Chattels, ^(b) except only such Persons as are prohibited by some special Law or Custom. ^(c) And as this refers to the making of Testaments in the Active Sense aforesaid : So it holds true also as to the Passive ; that is, that regularly every Person is capable of taking by a Testament or Codicil, that is not by some Law, which runs in prejudice of him, especially excepted and excluded : And all these the Law comprehends under two Generals ; *viz.* Either such as are *incapable* of taking either as Executors, or Legataries, by Testaments, Last-Wills, or Codicils, ^(d) or such as the Law calls *Indigni*, or unworthy : ^(e) These may take by a Testament, but cannot hold or retain what they take : As to these, all Testamentary Advantages are not void, but voidable : But as to the other, they are not only voidable, but also void. The *Indignus* may be *jure Capax*, though *effectu Incapax* ; but the other are incapable in all respects whatever.

3. The Persons who are incapable of making Testaments in the Active Sense aforesaid, with the Reasons thereof in Law, may all fall

- (a) Inst. quib. non est permis. fac. Test. in prin. & gloss. ibid.
 (b) Roland. de Codic. nu. 6.
 (c) Gloss. Inst. ubi sup. § 1. & Graff. Theff. Com. Opin. q. 26. nu. 1.
 (d) ff. de his quæ pro non script. habent.
 (e) Tit. De his quæ ut indign. aufer.

fall under these five Considerations : 1. Such as are by Law prohibited for want of *Discretion* ; as Children, Mad, or Lunatick Persons, Idiots, Old Persons grown Childish through excess of Age, and Persons actually Drunk. 2. For want of Freedom or Liberty, or that are not *Sui juris* in all respects ; as Villains, Captives, and Women Covert. 3. For want of some of their principal Senses ; as Deaf, and Dumb, and Blind. 4. Such as are Criminous ; as Traytors, Felons, wilful *Felo's de se*, and the like. 5. Such as are prohibited by reason of some certain Legal Impediments ; as outlawed Persons, Persons at the very Point of Death, Alien-Enemies, and such others. But here note, That all the said Persons are not in all Cases absolutely and utterly Intestable, but in some certain Cases only, as will more distinctly hereafter appear.

4. Whether Kings and Sovereign Princes may make their Testaments, is resolved in the Affirmative : But of what things, is such a *Quæstio Status*, as is safest resolved by a *Noli me tangere* : Suffice it therefore in this *Supra nos* point, to say no more than what the Lord Coke asserts, *viz.* That the King, his Heirs and Successors, may lawfully make their Testaments, and that Execution shall be done of the same. (e) He gives us an Instance or Precedent in the Testament of King Henry IV. whose Executors refusing, the Arch-Bishop of *Canterbury* was to grant Administration with the Testament annexed. (f)

(e) Co. Instit.

par. 4. c. 74.

Cur. Prærog. ubi

cirat. Rot. Par. 16.

R. 2. nu. 10. &

Rot. Par. 1. H. 5.

num. 13. (f) Co. ibid. See 1 H. 6. nu. 18.

C H A P. VIII.

Of Persons Intestable by reason of the want of Discretion.

1. *Of Children in Minority.*
2. *Of Mad Persons, and Proof of Insanity.*
3. *Of Idiots, or Natural Fools.*
4. *Of Persons grown Childish by reason of Old Age.*
5. *Of such as are Drunk.*
6. *Law-Cases relating to the third Paragraph of this Chapter.*

1. **A**N Infant-Male at the Age of fourteen Years, and Female at the Age of twelve Years, may make a Testament touching Goods and Chattels; (a) although both Sexes in Construction of Law, are Minors, or Infants, until the Age of Twenty one Years; (b) 'till which Age neither of them can make any Conveyance of Land good in Law. (c) And before the said respective Ages of Twelve and Fourteen Years, neither of them can make any Testament at all, no, though it be *ad Pios usus*: (d) But at the accomplishment of the said respective Ages each of them may, even without the Consent of his or her Guardian, (e) or Parent, if they have any Goods in their own Right, make a Testament thereof, (f) though not of Lands of Inheritance, (g) unless the Custom of the place doth enable them for it. (h) But before the said respective Ages, neither of their Testaments is good, though made by the Approbation and with the Consent of their Guardians; (i) yea, though they afterwards attain to the said Ages, and then neglect to ratifie them: (k) But if he or she hath attained to the last Day of the said Ages of twelve or fourteen Years, the Testament so made by him in the very last Day of the Age of fourteen Years, or by her in the very last Day of the Age of twelve Years, is as good and lawful, as if the said Day were then already expired; (l) or if after the accomplishment of the said Ages respectively, he or she doth expressly approve and ratifie the Testament made during their Minority, then is the same made good and effectual by this new Declaration thereof. (m) But if an Infant make a Will, and publish it, and then die, this Will is void; (n) yea, an Infant may not by Custom make a Will 'till he be fourteen Years of Age. (2)

2. Such as are mad Persons can make no Testament during the time of their Insanity of Mind, (n) no, not so much as *ad Pios usus*.

(a) L. qua ætate. ff. qui Testa. fac. possint & §. preterita. & Inst. quib. non est permiff. & l. si frater. C. qui testa. fac. poss. & Cowel. Inst. lib.

2. tit. 12. (b) Dr. & Stud. l. 1. c. 21. & lib. 12. c. 28.

(c) Stat. 34 H. 8. c. 5.

(d) Jus. in dist. 1. si frater.

(e) Jaf. ibid.

(f) Perk. tit. de- vise, fol. tit. 97.

(g) Stat. 34 H. 8. c. 5.

(h) Perk. ib. f. 504.

(i) Jaf. ubi supra.

(k) L. preterita.

Inst. quib. non est permiff. fa. test.

(l) Dist. 1. qua ætate & ibi Bart.

(m) Paul. de Cast. & alii in l. si frater. C. qui testa. fac. poss.

(1) Plowd. 344. Noy 4.

(2) Anderf. 2. 12.

(n) L. furiosum C. qui testa. fac. poss.

- (o) Bart. in l. 1. *ufus*. (o) Nay, the Testament made at such a time shall not be good, though afterward the Party recover his former Understanding; (p) howbeit, if such Lunatick Persons have any *Lucida intervalla*, or Intermiſſions, then during the time of ſuch freedom from the Lunacy they may make their Testaments betwixt the Fits. (q) And here note, that every Perſon is preſumed to be of perfect Mind and Memory, until the contrary be proved. (r) So that he that objecteth Inſanity of Mind, muſt prove the ſame; (s) for which it is ſufficient if he prove, that the Teſtator was beſide himſelf, or had loſt his Reaſon but juſt before he made his Teſtament, though he prove not the Teſtator's Madneſs at the very time of making the ſame, (t) unleſs the contrary be proved, or Circumſtances to induce a contrary preſumption. (u) For it is a very tender and difficult point to prove a Man not to have the uſe of his Reaſon and Underſtanding; therefore it is not ſufficient for the Witneſſes to depoſe that the Perſon was mad, unleſs withal they render upon knowledge a ſufficient reaſon thereof. (w) Neither is one Witneſs ſufficient to prove a Man mad, (x) nor two, in caſe the one depoſe of the Teſtator's Madneſs at one time, and the other of his Madneſs at another time; (y) but both agreeing in time, if then the one Witneſs depoſeth of one mad Act, the other of another mad Act at one and the ſame time, theſe ſufficiently prove that the Teſtator was then mad, though they do not both depoſe of one and the ſame mad Act. (z) But in contrary Depoſitions theſe Witneſſes are to be preferred, which depoſe that the Teſtator was of ſound Memory. (a) And if he uſed to have ſome Intervals of Reaſon, and it be not certainly known whether the Teſtament were made in, or out of his Fits of Lunacy; in this Caſe, if no Argument of Frenzy or Folly can be collected by the Teſtament, it ſhall be preſumed to be made during the Intermiſſions of the Lunacy, and ſo adjudged to be good; (b) yea, though it cannot be proved that the Teſtator uſed to have any clear and calm Intermiſſions at all, provided the ſame Teſtament be wiſely and orderly made, (c) otherwiſe not. (d) For in this Caſe, the leaſt word ſounding to Folly, is ſufficient to induce a preſumption that the Lunatick Perſon had no Intermiſſion of perfect Reaſon and ſound Memory at the making of ſuch Teſtament; for one fooliſh word in that caſe may frustrate the Validity of the whole. (e) But if a Man who is of good and perfect Memory, maketh his Will, and afterwards by the Viſitation of God, he becomes of unſound Memory (as every Man for the moſt part before his death is) this Act of God ſhall not be a Revocation of his Will, which he made when he was of good and perfect Memory. *Coke 4. Part. 124. Beverley's Caſe.* But a Perſon *Non Sane Memoriae*, or a Lunatick, cannot, whilſt he continues ſuch, make a Will, or di poſe
- (o) Bart. in l. 1. C. de Sacroſ. Eccl. n. 16.
(p) Diſt. l. furioſum.
(q) Ibid. & diſt. Spreteria. & DD. ibid.
(r) Bart. in l. nec Codicillos Cod. de Codicillis.
(s) Bart. ibid.
(t) Gloſ. in c. fin. de Succeſ. ab Inreſtat.
(u) Mantic. ubi ſupra. lib. 2. tit. 5.
(w) Bald. in diſt. l. furioſum. & Maſchard. de probat. ver. furioſus.
(x) Maſch. ibid. & Conf. 127. n. 9.
(y) Ibid.
(z) Maſch. poſt Ruin. ubi ſupra.
(a) Gabriel. l. 1. Con. Conſt. tit. de Teſt. Con. 4. nu. 19.
(b) Graf. Theſ. com. Opin. verb. Teſta. q. 21. & Vaſq. de Succeſſ. l. 1. § 2. nu. 20.
(c) Graf. 25. n. 4. & Boer. q. 23. n. 88. & Ludo. Decif. 1. nu. 13.
(d) Bald. & Angel. in diſt. L. furioſum.
(e) Angel. ibid.

dispose of his Lands. (1) To conclude a Man to be *Sane Memorie*, he ought to be able to distinguish of things with good Understanding, to have Judgment to discern, and in a word, to be of perfect Memory, otherwise his Will is void. (2) To be of sound and perfect Memory, is to have a reasonable Memory and Understanding to dispose of an Estate with Reason. (3) For a Mad or Lunatick Person, during the time of his Infirmitie of Mind, is Intestable both as to Land and Goods : But if he hath his *Lucida Intervals*, and do make a Will during the time of such clear and calm Intermittions, in quietness and freedom of Mind, it is good. (4) The Testator's Mind is the Testaments primary and chief Essential ; for if he were at the time of the making thereof otherwise than *Compos mentis*, the Testament is null. (5) Yet regularly, the Law will presume every Man to be of sound Mind and Memory, and will cast the *Onus probandi* on him who asserts the contrary ; (6) which is but consonant to the presumption of Nature it self.

3. *Idiots* are likewise excluded from making Testaments , nor may they dispose either of their Lands, (*f*) or of their Goods ; (g) But he that is only of a mean Capacity or Understanding, or one who is, as it were, betwixt a Man of ordinary Capacity and a Fool, such an one is not prohibited from making a Testament, (*b*) provided that he hath Understanding enough to conceive what is the Nature of a Testament or Last-Will, being well informed thereof ; otherwise he being destitute of such Understanding, is not fit to make a Will. (*i*) Here note, that by the Laws of this Land, he that can measure a Yard of Cloth, or rightly name the Days of the Week, or beget a Child, shall not be accounted an Idiot, or a Natural Fool ; (*k*) yet it will not be indisputably granted, that an Act so Natural as the begetting of a Child, can so qualifie a Natural Fool, as to render him in the charitablest Construction of Law Testable. For if he be such a Natural Fool, as that though of lawful Age, yet cannot declare of about what Age he is, nor number Twenty, nor knoweth his Natural Parents by their several Names and Relations, or the like easie Questions, such an Idiot is undoubtedly Intestable. (*l*) Notwithstanding all which, if it may appear by sufficient Circumstances and Conjectures, that such Idiots had the use of Reason and Understanding at such time as they did make their Testaments, then are such Testaments good in Law. (*m*) And yet if he be an Idiot indeed, albeit he may make a wise, reasonable, and sensible Testament as to the matter of it, yet it will be void. (*r*)

4. *Persons grown Childish by reason of Old Age*, can no more make their Testaments than Children ; (*n*) yet Old Age alone doth never deprive a Man of the power of making his Testament :

E

(o) But

(1) Vid. Stat. 32 H. 8. & 34 H. 8.

(2) More 760

(3) Co. 6. 23.

(4) Dyer 203, 204. Co. 8. 143.

(5) L. furiosum C. qui test. fac. & § item furiosi. Inst. quib. non est perm. fac. Test.

(6) C. ult. De Sac. ab Intest. & DD. Com.

(f) Stat. H. 8. an. 34. c. 5.

(g) Sichard in Rub. C. qui test. fac. pos. nu. 16.

(h) Simo. de Præc. de interp. ult. vol. 1. 2. dub. 1. fo. 4.

(i) Co. lib. 6. in Casu Paulet le Marq. de Winchester.

(k) *Terms of Law*. verb. *Idiot*. & Stamford de Prærogat. Regis.

(l) 3 Eliz. Dyer 203, 204.

(m) Franc. in dict. L. Furiosum. & Mant. l. c. 15.

(n) Peik 503, 504. 44 E. 3. 32.

(o) Simo. de Præc. de interpretat. ult. vol. lib. 2. Dub. 1. Sol. 4. nu. 22.

(o) L. Senium. C. (o) But when a Man, by reason of extreme Old Age, is become
qui testa. fac. poss. even a Child again in his Understanding, or rather in the want
thereof, or by reason of extreme Old Age, or other Infirmary, is
become so forgetful, that he now knoweth not his own Name, he
is then no more fit to make a Testament than is a Natural Fool, or

(p) In fin. C. de Child, or Lunatick Person. (p)
hæred. Instit.

5. Such as are drunk, during the time of their being drunk,
(q) Vafq. de Suc- can make no Testament that shall be good in Law : (q) Yet un-
ces. l. 2. § 12. nu. derstand this, as only when he is so excessively drunk, that he is
50. & Simo. de altogether deprived, for the time, of the use of Reason and Under-
Prætit. l. 2. int. 1. standing, being, according to the Flaggon-phrase, as it were dead
Dub. 1. Sol. 4. drunk ; for if he be but so drunk, that his Understanding is but
nu. 22. somewhat clouded and obscured, and his Memory but troubled,
he may in that case make his Testament, and it may be good in

(r) Idem Vafq. & Law. (r) He therefore that is but exhilarated with Liquor, and
Simo de Præt. ubi thereby doth but somewhat deviate from the Rule of right Rea-
supra. son, is not the Person whom the Law renders at that time Intesta-
(2) Reafner. par. ble ; but he, who by a continual Custom of Topping, or by such an
c. 12. de Testam. Excess of Drunkenness, hath so exil'd his Intellects, that he hath at
& Didac. Spino. present, as it were, totally lost the *Rational*, and reserved nothing
in Spec. Testa. to himself but the *Animal*. (2)
rit. de Testa.
Furiol.

6. *A.* Executor of *J. S.* brought an Accompt against *B.* as Re-
ceiver of the Moneys of the said *J. S.* upon *Ne unquam* Receiver
pleaded : It was found for the Plaintiff, and Judgment given, that
he should Accompt ; and being in Custody upon a *Capias ad Com-*
putandum, he was found in Arrearages, and his Body taken in
Execution. Afterwards the Will was made void in the Ecclesi-
astical Court, for that the said *J. S.* was an Idiot from his Birth ;
which being certified by Writ into the Chancery, and thence by
Mittimus into *B. R.* an *Audita Querela* was brought by *B.* setting
forth all the said matter ; whereupon the Court demurr'd. (20) It
was said by *Coke*, that in 35 *H. 8.* it had been adjudged, that in
that Case the *Audita Querela* did well lie.

(20) 3 Eliz. Dyer
203. vid. Co. 8.
part 147. in Dr.
Drury's Case. In
Hugh's Abridg-
ment, verb. *Wills*
and Testaments.

The Marquess of *Winchester* by his Will in writing (as suppo-
sed) devised divers Mannors to his reputed Sons, devising fur-
ther, that they should sell divers Mannors ; and also bequeathed
Plate and other Legacies to them. This Will was assayed to be
proved in the Prerogative Court ; but it appearing by Circum-
stances, the said Marquess to be *Non compos mentis*, at the time
when the supposed Will was made, it was moved for a Prohibi-
tion in *B. R.* because a Will touching Lands, and a Will con-
cerning Goods were both mixt together ; and that in Case they
should there proceed as to the Goods, the same would prevent
the Tryal in the King's Bench, where a Will for Land shall be
tried ; for which Reason a Prohibition in that Case was gene-
rally

rally awarded. (21) In that Case it was resolved, That a Testa- (21) Trin. 31 El. tor at the making of his Will ought to be of a Memory, not only in B. R. Co. 6. to answer to ordinary and familiar Questions ; but also to have a part 22. *The Mar-ques of Winche-* disposing Memory, so as to be able to make a Disposition of his ster's Case in Hughes Abridgment, Lands with Reason and Understanding ; and that that is such a Memory, which the Law calls *Sanæ Memoria*.

C H A P. IX.

Of Persons Intestable for want of Freedom or Liberty.

1. *Of Villains, and the distinct kinds thereof.*
2. *Of Captives, regularly Intestable ; in what Cases their Testaments may be good.*
3. *Of Prisoners, and their Qualifications in point of Testability.*

1. **V**illains are Intestable, if their Lord by Entry and Seizin take and enjoy all their Lands and Goods, (a) otherwise (a) Bro. Abridg. tit. Villen. & Perk. their Wills are not void, but by such Entry and Seizin before Pro- part 22. *The Mar-ques of Winche-* bate they become voidable ; (b) except of such Goods, whereof (b) Dr. & Stu. l. 2. c. 43. such Villains were Executors to others ; for of such Goods they (c) Bro. ibid. nu. 73. may not only make their Wills, (c) but also maintain Actions even against their Lords, in case they should take from them such Goods as they have by Executorship. (d) A Villain signifies (d) Ibid. nu. 68. in the Common Law a Bondman, and is the same with *Servus* in the Civil Law. Whereof there were two sorts anciently in this Kingdom : The one a Villain in gross, or one immediately bound to the Person of his Lord and his Heirs, the other a Villain Regardant to a Mannor, the same with *Glebæ Ascriptitius* in the Civil Law ; being bound to their Lord, as Members belonging or annexed to such a Mannor, whereof the Lord is the Owner. (1)

Nat. Bre. fol. 8. & 39. Vid. Braët. cap. 6. nu. 4. & Tyraq. de Nobil. cap. 2. p. 14. nu. 54. & Connan. lib. 2. cap. 10. nu. 3.

2. A *Captive*, during the time of his Captivity, cannot make a Testament ; (e) yea, tho' he afterwards make an escape, yet the (e) L. ejus qui ff. de Testa. & Brac. l. 2. § 16. n. 5. Testament made during the Captivity is void ; (f) but if it were (f) Dist. L. ejus qui. made before his Captivity, then after his Escape or Enlargement it shall be as good in Law, as if he had not been Captive at all. (g) (g) L. ratio ff. de Captiv. & Graff. Thes. Com. Opin. Likewise he that is alive, and in Captivity (for the upholding of his Will which he made in his Liberty) is feigned by a Legal Fiction to § testa. q. 25.

- be dead the Hour before he became Captive ; so that if he die in Captivity, yet is his Testament so made before his Captivity, allowed, and his Executor shall have all his Goods, as if he had died the Day before his Captivity. (b) Or if he return from such Captivity, the Testament he made before his being Captive, is conserved *Jure Postliminii* ; but if he die under Captivity, then *Fictione Legis Corneliae*. (2) Likewise if any Person be taken by a Pirate, Turk, Infidel, or Christian, with whom open War is not proclaimed ; he so taken, remaineth a Free-man in Construction of Law as to Testability, notwithstanding such Capture ; and therefore his Testament made during such Restraint shall be good : (i) For such Pirates and Sea-Rovers, though Turks, the Law doth distinguish from lawful Enemies. And therefore he that is only under the Capture of such Thieves and Robbers, may make his Testament. (3)
3. Persons condemn'd to perpetual Imprisonment cannot make a Testament ; (k) but a Person imprisoned only for Debt, or the like, is not thereby disabled to make his Testament, (l) or is his Testament void, except it be made in the favour of him at whose Suit the Testator is imprisoned, on purpose to extort the same from him. (m) And although it is the more common and received Opinion, That a Person condemned to perpetual Imprisonment is Intestable, (4) yet it is not so clear in the Law, as to render it indisputable : For in this point it doth distinguish between Ecclesiasticks and Lay-Persons, holding it true in the later, but otherwise in the former : (5) Others there are, that will not allow it to be true in either ; (6) and render a solid Reason for such their Opinion : For (say they) a Condemnation to perpetual Imprisonment is contrary to the *Jus Civile*, (7) and expressly prohibited by the Civil Law ; (8) whereby therefore such are not prohibited to make their Testaments, though by the Canon Law it is otherwise *inter Clericos*. (9) But this Point seems to be best resolved by him, who doth distinguish between such Condemnation to perpetual Imprisonment, with a Confiscation of their Goods and Chattels, and such Condemnation without such Confiscation ; holding, that in the former Case they are Intestable, otherwise in the latter. (10)
- (b) L. lege Cornel. ff. de Testa.
(2) Instit. Quib. non est permiss. facere Testam. §. ult. & Graff. §. Testamentum quaest. 25.
(i) L. qui a Latronib. ff. de Test.
(3) Vasq. Controvers. l. 3. c. 103. nu. 1.
(k) Panor. in Rub. Extra. de Testa. & Graf. Thes. Com. Opin. § Testa q. 28.
(l) Bald. in l. 1. Cod. Si quis aliq. test. prohib. nu. 5.
(m) L. qui carcerem. ff. quod metus, causa. & Mant. sup. l. 1. tit. 7. n. 2.
(4) Tèpar. tit. de Testam. in gener. c. p. 11. & Jul. Clar. § Testam. q. 23.
(5) Jul. Clar. ibid. & Graff. § Testamentum. q. 28.
(6) Angel. Marth. lib. 2. c. 1. nu. 13. & Clar. dict. q. 23.
(7) L. aut damnatum § solent. De penis.
(8) Capriol de Success. ab intest. in Pract. num. 309.
(9) Capriol (10) Petr. Greg. lib. 42. cap. 8. nu. 12.

C H A P. X.

Of Women Covert.

1. *Women Covert Intestable as to Lands.*
2. *They are Intestable as to Goods without the Husband's License.*
3. *They are Testable as to Chattels by Executrixship.*
4. *They are Testable as to things meerly in action, whereof they were not possessed during Coverture.*
5. *Whether they may accept Executrixship without their Husband's Consent, or the Husband Administer in case of their Refusal thereof.*
6. *Cases in the Law concerning this Subject.*

1. **T**HAT *Women Covert* are Intestable for want of Freedom, is not such a general Rule in Law as to exclude all Exceptions. It is true, a married Woman cannot make her Testament of any Lands, Tenements, or Hereditaments, (*a*) specially she cannot devise the same to her Husband, (*b*) though she were not thereto constrain'd by him, but would do it of her own accord freely and voluntarily, and though such Testament were made before her Marriage with such Legatary-Husband. (*c*) And albeit the Wife survive the Husband, yet the Testament made during Coverture is not good. (*d*) But yet if after her Husband's death she approve and confirm such Testament, made under Coverture, then this new Consent, or new Declaration of her Will makes the Devise good. (*e*) Also, if the Testament were made before Marriage, and she outlive her Husband, it shall be good. (*f*) Also, where Power of selling the Testator's Land is given to a Wife-Executrix, there she may sell even to her own Husband, (*g*) or to whom she please.

2. Of Goods and Chattels the Wife cannot make her Testament without her Husband's License; (*b*) for all the Goods and Chattels which the Wife had at the time of Marriage, (*i*) and all the Chattels real (if he survive the Wife) belong unto the Husband by virtue of the said Marriage. (*k*) Yet by the Husband's License she may make her Testament even of his Goods, (*l*) yea, though the Husband understand not of his Wife's Will, yet if after Probate thereof made by the Executors, he deliver them the Goods therein devised, he thereby ratifies the Testament, though he were not privy to the making thereof; (*m*) for the Goods being once delivered by him, according to the Tenour of the Will, it is then too late for him to revoke the same; (*n*) Otherwise, notwithstanding

(a) Stat. 34 H. 8. c. 5.
 (b) Brook. Abridg. tit. Devise. nu. 32, 34.
 (c) Arg. § alio. Inst. quig. mod. testa. infir.
 (d) C. non firmatur. de Reg. jur. 6. l. 1. § 1. de Legat. 3.
 (e) L. 1. § 1. ff. de Legib.
 (f) Plowd. in Caf. inter Brett. & Rigden. f. 343.
 (g) Stat. 10 H. 7. c. 20.
 (h) Bract. de leg. & Conf. Angl. l. 1. c. 26. & Bro. tit. Devise, nu. 34.
 (i) Tract. de Rep. Angl. l. 3. c. 6. & Dr. & Stud. l. 1. c. 7.
 (k) Dr. & Stud. ibid.
 (l) Lynwood. c. Statutum. vert. de Testa. l. 3. & Bract. l. 2. c. 26. & Bro. tit. Devise. nu. 34.
 (m) Perk. tit. Devise. cap. 8. fol. 97.
 (n) Ibid.

(o) Brook. ubi
supra.

(1) Vid. *Anderf.* 2.
par. 12. 92. *Cro.* 1.
fo. 27. *Cafe Efton*
vers. *Wood*.

(2) *Cro.* 3. fo. 106.
John's vers. *Row*.

(3) *Mich.* 25, 26
El. Swaleman mar-
ried to one *Wood*.

(g) *Fitzh. Abridg.*
tit. *Exec. nu.* 20.
& *Brook* cod. tit.
nu. 11. & *Perkins.*
tit. *Devise.* c. 8.
fo. 97. & *Stat.* 12
H. 7. cap. 24.
(q) *Offic. of Exec.*
cap. 7. & *Cof.*
Apol. par. 1. c. 3.
(r) *Offic. Exec.*
ubi supra.
(s) *Plowd* int
Crimsby & Gran-
tham. 10. 525.

withstanding his License given her to make a Will of his Goods, he may revoke the same at any time before the Probate thereof. (o) Or otherwise having made her Will by her Husband's License, he may chuse whether he will suffer it to be proved; for his Consent is necessary as well to the Approbation as to the first making thereof. And this extends also to the Goods which she had in her own Right before Marriage, for thereby immediately all Chattels personal, and Goods movable, are so devested out of her into her Husband, that although she survive him, yet they return not to her again, but go to her Husband's Executor or Administrator. Therefore if the Wife by the Husband's License make a Testament of his Goods, he may notwithstanding at any time before her death revoke it, or after her death before it be proved. But a Woman Sole after Contract for Marriage made by her, may before Solemnization of such Marriage make her Testament; for she is not at all disabled thereto by such Contract. (1) But if she die under Coverture, such Testament is void, unless the Husband in her Life-time give his Consent thereto, and after her Death ratifie it, by permitting the Probat thereof. But by his Consent she may make him Executor of things in Action, as Debts, *de biens asport*, before the Coverture, and the like. (2) And although the Wife makes her Will by the Husband's License, and with his Consent; yet if after her death, he enter a Caveat against the Probat thereof, or otherwise forbid the same, it is such a Countermand of the Testament, as hath the effect of a Revocation in Law: But if the Husband by Covenants be obliged to perform his Wife's Will, such Countermand as aforesaid, will be a Breach of the Covenants, and his Bond may be sued against him. (3)

3. Touching Goods which she hath as Executrix to another, the Case is otherwise; for such do (whether she or her Husband live or die) still remain in and to her only, whereof she may make her Will without her Husband's Consent, (p) and him, if she please, Executor; for otherwise he may not have them after his Wife's Decease, (q) because of such Goods (the Wife dying without Will) the next of Kin to the Wife's Testator may take the Administration, as *de bonis non Administratis*. (r) And here Note, that though the Wife being Executrix to another, may without her Husband's License make her Testament of such Testator's Goods, yet she may not bequeath them by Legacy without making an Executor. (s) But if the Wife be made as well Legatary as Executrix, and she accept of the Testator's Goods, not as Executrix, but as Legatary, in this case she cannot dispose of the said Goods by Will or otherwise, without the Husband's Consent; for by accepting them as Legatary, she makes them her own, and conse-

consequently her Husbands. (t) And note further, that although (t) *Tra&t. de Rep.* the Wife being Executrix, may, without her Husband's Licence *Angl. l. 3. c. 6.* make her Testament of such Goods whereof she is possessed as Executrix, yet the fruit and profit arising (during the Marriage) out of such Goods shall accrue to her Husband, and not unto her self as Executrix; so that without her Husband's Approbation she can make no Testament of such fruits and profits so arising. (u) *Swinb. part 2. § 9. nu. 21. & part 3. § 6. n. 17.* And if it doth not appear whether the Wife accepted the same as Executrix, or as Legatary, she shall by the Laws of this Land, (herein not agreeable to the Civil Law) be deemed and presumed to have accepted the same as Executrix. (10) *Quest.* The ground or reason of such presumption? For regularly, the presumption of Law runs in favour of him to whom any thing is bequeathed; and it is more for the Parties Interest, to claim as a Legatary, than as an Executor, who is chargeable with Debts for what he receives under that Notion, which the other is not.

4. A Wife without her Husband's Licence or Consent may make her Testament of such Goods and Chattels whereof she was not possessed during Marriage, and as to such things she may make her Husband Executor if she please. (x) And the Husband cannot by Will bequeath or make an Executor of an Obligation which he hath in Right of his Wife, nor of any other thing meerly in Action. (y) For Debts or things in Action are not devided out of the Woman into the Husband by Marriage, yet she cannot make an Executor thereof, without her Husband's Assent; (z) for during her Life he may receive them, or release them, though after her death he shall not be entitled to them, unless his Wife make him Executor thereof, or after her death he take the Administration of her Goods, whereby he then becomes liable for her Debts out of the same when he shall have received them. (a) And thus also Chattels real are not so devided out of the Woman into the Husband by Marriage, but that she surviving him, and no alteration made of the Property in her Life-time by her Husband (who had then power to dispose thereof, though not by Will) they continue to her, and remain in her as before Marriage; (b) yet such a Woman in her Husband's Life-time could not without his Consent make her Will touching such real Chattels, but he surviving her, they would by the Operation of Law accrue unto him. (c) Thus a Woman under Coverture, may make an Executor as to the Goods and Chattels she hath as Executrix to another, without her Husband's Licence, and all things she hath in Action, *viz.* Debts due unto her upon Obligations, and Specialties, made to her alone, before, or after her Marriage. (1) *Fit. Execut. 28. Brook. Exec. 155. Lit. Bro. § 180.*

5. As without the Husband's Consent the Wife may not make her Will, so likewise without his Consent she may not take upon her the Office of an Executrix: (d) But if once the Will be proved, and the Execution thereof committed to the Wife, though against the Husband's Mind and Consent, probably it may stand good. Also the Wife's Administring without the Husband's privity, though no Will be proved, will probably bar the Husband as well as her self from Pleading in any Suit commenced against them, that she neither was Executrix, nor ever administred as Executrix. On the other side, if a married Woman named Executrix, refuse the Execution of the Will against her Husband's Mind and Desire, it is supposed the Law will not fix the Executrixship upon her against her Will; yet the Husband may Administer and Prove the Will for his Wife. (e) Also if the Husband (no Will being proved) doth Administer in his Wife's Right, but against her Will; this, notwithstanding her Dissent, will so bind her, that during her Husband's Life she can hardly decline the Executrixship; for that by the Law of the Land she cannot be sued alone as Executrix, and being sued with her Husband, she must joyn in Plea with him, whereby the Administration by her Husband will conclude her also, (f) but not so after his death, for then she may refuse. (g) In this point of the Wife's ability, or disability, of making her Testament with, or without her Husband's Consent, the DD. seem to be somewhat divided in their Opinions, and are at some variance: For some hold, That the Law, which ordains, That a Woman married may not make her Testament without her Husband's Consent, is not of any force. (1) Whereas others hold the contrary, and that that Law doth prevail. (2) So that in this the Common Law is more clear and certain than the Civil Law; yet there is good Reason why it may be so, for each of these Laws proceeding according to the Maxims and Principles thereof respectively, may vary in their Tenets accordingly: And therefore the one holding the Husband and Wife, in most Cases, but as one Person, the other under distinct Notions, cannot centre in the same Point in other Matters as well as this, relating to their respective Powers and Interests.

6. If a Feme Sole make a Will, and after take a Husband, the same is a Revocation thereof: For the making of a Will is but the Inchoation or Inception thereof, which hath no effect 'till the Testator's Death. because *Omne Testamentum morte consummatum est, & voluntas est ambulatoria usque ad extremum vite exitum*: And therefore it being no perfect Will when she takes a Husband, and after Marriage, her Will being her Husbonds, and subject to it by her taking a Husband, she hath wholly revoked the Will formerly made by her.

Debt upon an Obligation, the Condition was, Whereas the Defendant had taken *A. S.* to Wife, who was a *VVidow*, being poss'd of divers Goods; if he would permit his said *VVife* to make a *VVill*, and to dispose in Legacies so much as she would, not exceeding fifty Pound, and perform what she appointed, That, then, &c. The Defendant pleaded, that she did not make a *VVill*; whereupon Issue was joyned; it was found, that she made a *VVill*, and thereby disposed of divers Legacies, not exceeding fifty pound, but that she was a *Feme Covert* at the time of the making of the Will: In this Case it was adjudged for the Plaintiff. For, although she being a *Feme Covert*, could not in Law be permitted to make a *VVill* to dispose of any Goods without the Husbands assent; yet it is a *VVill* within the intent of the Condition; for it was in the intent of the Condition, That she should make a *VVill* to that purpose, notwithstanding the Coverture; and it is but her appointment, which the Husband by his Obligation is bound to perform; and the finding that she was a *Feme Covert*, was not in this Case material.

Mich. 5 Car. in
B. R. Mariot
and Kingman's
Case. Cro. 1.
part. 159. and
Hugh's Abridg.
Verb. Wills and
Testaments.
26 Ed. 3. 71.
Rolles Abridg.
tit. Devise G.

If a *Feme Covert* make a Testament, and devise Goods to another, and the Husband after her death deliver the Goods to the Devisee accordingly, it will bind him.

A Defendant Covenanted by Indenture with the Plaintiff, That whereas he intended to marry *E. S.* a Widow, That he would pay all the Legacies which she by her Last-*VVill* in writing, bearing date 1 May, 20 Eliz. did give and bequeath, and was bound by Obligation to perform the Covenants in the Indenture. In Debt upon the Obligation the Defendant pleaded, that after the making of the *VVill* and the Obligation, he intermarried with the said *E. S.* which Marriage continued till her death; so the Will and Devise of *E. S.* was void, and demanded Judgment, &c. And it was adjudged that the Plaintiff should recover. For notwithstanding it was not a *VVill* to all intents and purposes, yet the Indenture referreth to that which did bear the name of a *VVill*: And although it was not a *VVill* indeed, it was not material.

Pasch. 26. Eliz. C.
B. Efton ver.
Wood. Cro. pars. 3.
Pl. 9.

A *Feme Covert* Executrix may without her Husbands consent make an Executor of those Goods she hath as Executrix. Likewise she may make an Executor of the things in Action due to her.

Mich. 8. Jac. B.
Graunt's Case,
per Curiam. Roll.
Abridg. tit. De-
vise.
Ibid. Roll. Abr.
tit. Devise.

A *VVoman Covert* may make a Testament, if her Husband agree to it after her death. And such, albeit she be an Executrix, cannot Devise any of the Goods she hath as Executrix, without her Husbands consent or his agreement to it afterwards; yet she may make an Executor thereof without his consent. Likewise a *Feme Covert* cannot Devise things in Action which she hath, without the consent and agreement of her said Husband.

Roll. Abridg.
tit. Executor. E.

If a Woman Covert die Intestate, Administration may be committed of her Goods; for possibly she had things in Action, which are not given by the Law to her Husband. *D. 8 Eliz. 251. 90. Amit.*

C H A P. XI.

Of Persons Intestable by reason or for want of their principal Senses.

1. *In what Cases persons Deaf, Dumb or Blind may make their Testaments or not.*
2. *How far Testaments begun, but not finished, may be good, or not.*

(a) L. discretis.
C. qui testa. fac.
poss. & §. item
Surdus. Inst.
quib. non est
permis. fac. test.
(b) Decius in
dict. l. discretis.
& Tyraq. de Pri-
vil. pæ. Caus. c. 9.
(c) Dict. §. item
Surdus. inst. quib.
non est permis.
fac. fac. testa.
(d) Dec. & Tyr.
ubi supra.
(e) Mynsing. in
dict. §. item
Surdus.
(f) DD. in dict.
l. discretis.
(g) DD. in l.
confutissima
Cod. qui testa.
fac. poss.

1. **H**E that is both *Deaf* and *Dumb* by Nature, can make no Testament or Last-Will, (a) except it may appear upon good and sufficient ground that he doth understand what a Testament means, and also that he hath *Animus Testandi*; for if so, then he may by plain significative tokens and signs declare his Testament. (b.) But in case he *Deaf* and *Dumb* only by accident, he may (if he be able) write his Testament with his own hands; (c) or otherwise, not being able to write, yet having understanding, he may, as the other, make his Will by signs, else not at all. (d) Such as are only *Deaf* and not *Dumb*, may make their Testaments. (e) Also such as are *Dumb*, and not *Deaf*, may write their own Testaments if they can, otherwise they may make them by good and sufficient signs well known to the Witnesses then present. (f) Also a *Blind* may make a *Nuncupative* Testament before a sufficient number of Witnesses, but not a *written* Testament, unless the same being read to him before Witnesses, he in their presence acknowledge the same for his Last-Will and Testament: So that the bare acknowledging thereof to be his Last-Will, without hearing the same read unto him, is not sufficient. (g.)

2. Testaments begun, but not finished, may be good or not, as they vary in their Circumstances: For if whilst the Testator is making of his Will, purposing and intending to proceed on farther therein, by adding, diminishing or altering, he be suddenly surpriz'd with some violent sickness or Insanity of mind, whereby he cannot proceed in his intended Will, but is enforced to give it over, possibly in the midst thereof, and so dies: In this

Case

Case it seems the whole Will, that is, the whole of what he had made, will be void. (1) But yet if a man begins his Will, (1) Lit. Broo^x and maketh some perfect Devises to one or more, and then of Sect. 300. Co. 3. himself, or voluntarily, gives over until another time: Or if a 31. man make a perfect Devise to one, and then dies before he can make any other Devise to others, it seems these shall be good (2) Brown. l. 1. Wills for so much as is done. (2) 44.

C H A P. XII.

Of Persons Intestable by reason of some Criminal Convictions.

1. Traytors Intestable from the time of the Crime committed.
2. Felons not Intestable before Conviction.
3. Hereticks Intestable, till they reclaim their Heresie.
4. Apostates Intestable.
5. Incestuous Intestable, saving to their Parents and Children.
6. Sodomites are Intestable.
7. Self-Murderers Intestable under Limitations.
8. Out-Laws and Excommunicates not absolutely Intestable.
9. Out-lawry in an Intestate, no good Plea in Bar to a Creditors Action against his Administrator.

Before the World was gone too far from its primitive state of prudent Frugality, and when Debauchery was no Vertue, nor Prodigals, nor infamous Libellers were Testable, as to the making or proving of a Will. l. is cui. & Gloss. ibid. ff qui test. fac. poss.

If a man criminally indicted, die before he be condemned, his Testament is good.

Pendente processu capitali, non impeditur quis facere Testamentum — Rub. in l. si quis. ff. qui test. fac. poss.

Where no property in Goods or Lands, there no ability to Devise.

(a) Stat. 5. Ed. 6. cap. 11.

(b) Stat. ibid. & DD. in l. nemo de legib. & l. quis. cap. 3.

Not. 1. tit. de la

1. **T**raytors are Intestable, for they lose both their Lives, Lands and Goods, whereof they were possessed at the time of the Treason committed, or at any time after. (a) Inasmuch, that Traytors are Intestable, not only from the time of their Conviction, but also from the time of the Crime committed: So that the Testament before made, doth by reason of the Conviction become void, both in respect of Goods, and also of Lands, Tenements and Hereditaments. (b) Howbeit a Traytor that is pardoned and restored, may make his Testament. (c) † Neither shall such Goods as the Traytor hath as Executor to another be forfeited; whence it follows, that of such Goods he may make his Testament; which also extends to persons Out-law'd for Debt, also to persons attainted or convicted of Felony. (d)

quis l. 1. c. ad leg. Jul. Majest. & l. si quis de injust. Test. & Stat. 1 R. 3.

(c) L. si quis §. quatenus ff. de injust. rupt. & irrit. testamentis. † Pap.

nullite des Testaments. vers. la sixieme. (d) Stat. 32. H. 6. cap. 34.

(e) *Eliz. An. 5. cap. 14. and terms of Law. verb. robbery.* But if a Man be only indicted of Felony, and die before his Conviction or Attainder, he may make his Testament both of Goods and Lands: (f) Or being Indicted, and thereon Arraigned, stands Mute and Dumb, and will not answer; in this Case he forfeits only his Goods, (g) and therefore may make a Testament of his Lands. (h) And here note, that in respect of a Felons Lands, the time of the Fact committed is to be respected, but in respect of his Goods the time of his Judgment; (i) So that he loseth his Lands from the time of committing the Fact, but his Goods only from the time of Conviction, insomuch, that at any time before his Conviction he may bequeath, sell, or otherwise alienate his Goods and Chattels. (k) Howbeit if he make his Testament before his Condemnation, it will be frustrated and prevented by his Judgment. (l) So that the Testament of a Felon convicted is void, though he be never executed; void, even by force of the Condemnation (m) unless he afterwards doth obtain his pardon. (n) So that persons Attainted or Convict, though during their Disabilities they cannot make any Testament, nor consequently any Executors, because they die not possess of any Goods in their own right, yet they may be Executors to others: And as such, and as to the Goods they have only as such, they may dispose thereof by their Last-Wills; and of such Goods they may make Executors, and may also maintain a Writ of Error to Reverse a Judgment given against the Testator. (1) But Goods taken away from a person Attainted or Convicted by a Trespasser cannot be recovered by any Suit or Action commenced by his Executor, because the Property thereof in right still appertaining to such person Attainted or Convict, they are forfeited by the Attainder or Outlawry of him from whom they were so in the way of a Trespass wrongfully taken.

2. *Felons* are likewise Intestable being lawfully convicted, for the Law hath otherwise disposed of their Lands and Goods: (e) But if a Man be only indicted of Felony, and die before his Conviction or Attainder, he may make his Testament both of Goods and Lands: (f) Or being Indicted, and thereon Arraigned, stands Mute and Dumb, and will not answer; in this Case he forfeits only his Goods, (g) and therefore may make a Testament of his Lands. (h) And here note, that in respect of a Felons Lands, the time of the Fact committed is to be respected, but in respect of his Goods the time of his Judgment; (i) So that he loseth his Lands from the time of committing the Fact, but his Goods only from the time of Conviction, insomuch, that at any time before his Conviction he may bequeath, sell, or otherwise alienate his Goods and Chattels. (k) Howbeit if he make his Testament before his Condemnation, it will be frustrated and prevented by his Judgment. (l) So that the Testament of a Felon convicted is void, though he be never executed; void, even by force of the Condemnation (m) unless he afterwards doth obtain his pardon. (n) So that persons Attainted or Convict, though during their Disabilities they cannot make any Testament, nor consequently any Executors, because they die not possess of any Goods in their own right, yet they may be Executors to others: And as such, and as to the Goods they have only as such, they may dispose thereof by their Last-Wills; and of such Goods they may make Executors, and may also maintain a Writ of Error to Reverse a Judgment given against the Testator. (1) But Goods taken away from a person Attainted or Convicted by a Trespasser cannot be recovered by any Suit or Action commenced by his Executor, because the Property thereof in right still appertaining to such person Attainted or Convict, they are forfeited by the Attainder or Outlawry of him from whom they were so in the way of a Trespass wrongfully taken.

3. *Hereticks*, if they be Convicted, or publicly Excommunicated, cannot make a Testament of their Goods and Chattels: (o) But if they reclaim their Heresie, they are not Intestable. *Hereticks* take their Demonstration from the Pertinaciousness of their Opinion; and being Condemn'd or Convicted of *Heresie*, are both by the *Civil* and *Canon* Law as well Incodicillable as Intestable (1) yea, though such a Testator could pretend therein to the Privilege of the *Jus Militare*, (2) or the Testament it self were made in *Pius usus*, or for the benefit of the Testators own Children: (3) But that is to be understood only of such of his Children as are also Heretical. and not to be extended to such of them as are Orthodox; (4) Nor to *Schismaticks*, who retaining the Judgment and Doctrine of the Church, depart only from the Communion thereof.

4. *Apostates*, or they who do wholly renounce the Christian Faith which once they did profess, and do become Jews, Turks, or Infidels, are worthily excluded by the Law from being capable of making a Last-Will or Testament. (p) Such *Apostates* contracting to themselves the guilt of Treason against the *Highest Majesty*, are not only Intestable, but by the *Civil Law* may at any time within five years next after their death, be thereof Convicted and Condemn'd *per viam Accusationis*. (5)

(p) L. 1, 2, 3. C. de Apost. & Sum. Host. tit. de Apost. §. qualiter.

(5) L. 2. C. de Apostat.

5. *Incestuous* persons are prohibited to dispose of any Goods or Chattels by Will, saving to their Children begotten in Marriage, that is, in lawful Marriage; or to their Parents, Brothers, Sisters, Uncles or Aunts. (q) Where by Parents, understand all of each Sex in the right Line ascending; and by Children, all of each Sex in the same Line descending. (r)

(q) L. si quis C. de incest. nuptiis.
(r) Accurs. Bald. & alii in dict. L. si quis.

6. *Sodomites*, or such as are guilty of that wicked and abominable Sin against Nature, mention'd in the Holy Scripture, (s) as intestible, and prohibited to bequeath their Goods or Chattels. (t)

(s) Gen. c. 19.
(t) Spec. de Inst. edit. §. Compendioso. nu. 5.

7. *Self-murderers*, or such as wilfully destroy themselves, are Intestable; (u) nor can they make any Bequest of their Goods, for they are all Confiscate. (w) Yet there are those who distinguish between the kinds, or rather the occasions of Self-murder; viz.

(u) L. si quis filio. §. ejus ff. de test. & l. 2. C. qui test. fac. poss.

1. That which is occasioned through the fear of execution of a Judgment of Condemnation. 2. That which is occasioned through a tired sense of a long, tedious and irksome life. 3. That which is occasioned through the pain and violence of some Disease. In the first Case it is said, they lose, like other Felons, both

(w) Vasq. de Succes. Resol. l. 1. §. 8. nu. 31. & Bract. L. 3. tract. 1. c. 31.

Lands and Chattels; in the second, Chattels only; in the third, neither Lands nor Chattels. (x) Notwithstanding which Distinction, the Law is taken to be, That a *Felo de se* can make no Testament of his Goods and Chattels, but of his Lands he may. (6)

(x) Fleta. c. 36. in princip.
(6) 5 & 6 Ed. 6. c. 11. Flow. 258, 261.

8. *Out-lawed* persons, though not out-lawed but in an Action personal, forfeit all their Goods and Chattels, (y) and therefore cannot make any Testament thereof. (z) But the Out-lawed for Felony, forfeiting their Lands as well as their Goods and Chattels, cannot make any Testament of either. (a) Though the *Out-lawed* only in an action personal may make his Testament of his Lands, yet not so of his Goods and Chattels. And as for *Excommunicate* persons, if they be excommunicated for *Heresie*, or other cause which renders them in it self legally intestable, in such cause they cannot make a Testament; otherwise it is for the most part held they may. (b) And although persons *Excommunicate*, Hereticks, Usurers, Incestuous persons, Sodomites, Libellers, and such like, are Intestable by the *Civil Law*, yet at the *Common Law* the Testaments of such persons (at least for their Lands) are, or may be good. (1) And if an *Excommunicate* person be made

(y) Dr. & Stud. l. 2. c. 3. and terms of Law. verb. utlegare.

(z) Jul. Clar. §. testa q. 19. Dr. & Stu. l. 1. c. 16.

(a) Terms of law. verb. utlegat.

(b) Swinb. part. 2. §. 22.

(1) Fitz. Testament. 1. Perk. c. 496.

Executor,

(4) 42 E. 3. 13.

Executor, he cannot (the Excommunication depending) commence or prosecute any Suit or Action for his Testators Goods: Yet this doth not *null* his Executorship, or quite destroy the Action, but only suspends it until his Absolution. (2) And again, as to the person Out-lawed, it hath been a question propounded, but not resolved, Whether by the Out-lawry of the Legatee, before the Executors Assent, the thing bequeathed him be forfeited? The Presumption in Law seems to be full for the Negative; for that before the Executors Assent, the Legatee, though he may have a title to, yet hath no Legal interest in the thing bequeathed; nor without such Assent is the Property thereof altered.

(c) Vid. 37. H. 6.
27. by Prisoit. acc.
(d) Mich. 26 Jac.
in C. B. Bullen &
Gervis Case.
Hutton. 53.

9. An Action of Debt was brought against J. S. as Administrator of J. D. The Defendant pleaded, that the Intestate was Out-lawed at the Suit of J. N. after Judgment; and so being Out-lawed, died Intestate. It was resolved, That the Plea was not good; for it is but a Plea by Implication, that he hath not any Goods, and so but Argumentative. (c) And *Trin. 37. Eliz.* in C. B. Rot. 2954. *Wolley* and *Bradwel's* Case was vouched to be adjudged accordingly; and therefore the Court upon the view of the Record in *Wolley's* Case gave judgment, that in the principal Case it was no Plea. (d)

(e) Vid. 49. E. 3.
5. 29. Ass. 63.
33. H. 6. 27. acc.
in *Hugh's* Abridg.
Verb. *Wills and*
Testaments.
Mich. 43, 44. Eliz.
B. R. inter *Shaw*
& *Cutteresse* per
curiam. Roll.
Abridg. tit. Exec.
N.

If debt be brought against an Executor, and he pleadeth, That his Testator was, and died Out-lawed; it was holden in that case, that this doth not prove a Nullity of the Will, for then he might have pleaded, that he was never Executor; but it tends only to this, that no Goods did come to his hands for satisfaction of the Testators Debt, by reason of the Out-lawry. (e)

A man Out-lawed to a personal Action may make Executors; for he may have Debts upon Contract, which are not forfeited to the King. Consequently, for the same reason Administration of such a man's Goods may be granted.

If an Exigent for Felony be awarded against a man, whereby he loses all his Goods, yet he make Executors to reverse it, for there he is not attainted: So Administration of such a man's Goods may be also granted.

Co. 5. *Marshes*
Case. 111. Rol. ib.

C H A P. XIII.

Of Conditional Testaments.

1. *When a Testament may be said to be Conditional.*
2. *What words sufficient to express or imply a Condition.*
3. *The difference between Conditio and Modus.*

1. **T**HE Testament may then be said to be Conditional, when the Executor is therein Conditionally assigned and appointed, for the Assignment of the Executor is the Life and Soul of the Testament. Now the Assignment of the Executor is conditional, when such a suspensive quality is added thereto, as thereby the effect of the Disposition is for the time impeded, and dependeth on some future event. (a) But a Condition which restrains the Authority which was given by the first part of the Will, is void : As to make two Executors, provided that one of them shall not Administer. (1.) But a meer *Demonstration* (which refers to the time present or past, as Condition doth to the future) though in it self a false Demonstration of the person appointed Executor, doth not vitiate either Testament or the Executorship : And therefore if a Testator saith, *I appoint my Son Thomas, who was lately married, to be my sole Executor, Thomas* shall be his Executor, though he were never married. (2)

(a) Sichard. in Rub. de Inst. & Sub. Cinu. 1. 8. Graff. Thef. Com. Op. §. Legatum. q. 46.

(1) Dyer. 4. vid. Cro. 2. 697. Foy vers. Hinde.

(2) § Falsa. Instit. de Legat.

2. Many and divers are the words which do express or imply a Condition in a Last-Will or Testament, whereby the Testament it self, or the Disposition of the Testator, therein becomes conditional. Such are the words following; *viz.* [if, when, whiles, which, what Person, who, whosoever, and sometime the Ablative Case absolute.] Also these words following, *viz.* [except, unless, otherwise, until, whensoever, as much as, in as much as, for as much as, seeing that, to which end, to the end that, for this purpose, so far as, so long as;] also Prepositions, when they serve to, or govern the Accusative Case; as, [By and To;] yea and when they govern the Ablative Case; as, [With,] if it so appears to be the Testators meaning. And in a word, every part of Speech whatsoever it be, that suspendeth the Disposition of the Testator in expectation of some future event, doth either express or imply a Condition. (b)

(b) Bart. in. L. fi. de conditionib. & Demonstrat. & Mant. de Conject. ult. vol. lib. 10. tit. 5. & Sichard. ubi supra. C. nu. 4. & Vasq. de

Success. progress. lib. 3. § 29. nu. 3. in fine. & Barr. 1. si Titio. ff. quando dies Legat. cedat. & L. si ita Scriptum ff. de legat. 2. & Ripa in l. Centurio ff. de vulg. & pupil. Subst. nu. 160, 161. & Dyer fol. 74. nu. 16. & Alex. Consil. 185. lib. 2.

(c) Bald. & Sichard in Rub. C. de Instit. & Subst.

(d) Bart. in l. quib. dieb. §. Terminus ff. de Cond. & Demon.

(3) L. utilitas §. 1. & l. si ita. De manum. test.

(4) Gomez. Var. Refol. to. 1. c. 12. nu. 70. DD. Communiter.

3. *Conditio* is an annexed Quality, which so long as it dependeth unperformed, hindereth the effect of the Disposition. (c) And *Modus* is a Moderation whereby a charge or burthen is imposed by the Testator in respect of some commodity, which hinders not the effect of the Disposition in so strict and exact a manner as *Conditio* doth. And as *Conditio* is commonly known by the word [If.] so *Modus* for the most part is known by the words [So that. *d*] I do appoint *A. B.* my Executor, So that he gives 50*l.* to *C. D.* This is only a *Modus*. I appoint him my Executor, If he give the other 50*l.* That is *Conditio*. (3) And albeit the Testator should add a *Conditio* to the *Modus*, and say I appoint *A. B.* my Executor upon Condition, That he pay 50*l.* to *C. D.* yet in that Case it is but *Modus*, and not *Conditio*. (4)

C H A P. XIV.

Of the several kinds of Conditions incident to Testaments.

1. *The distinction of Conditions.*
2. *The Law of Possible Conditions.*
3. *The Law of Arbitrary, Casual, and mixt Conditions.*
4. *The Law of Affirmative and Negative Conditions.*
5. *Conditions Impossible, Unlawful and Captious, are ineffectual.*
6. *Necessary Conditions, of no force in Law.*

1. **A**S many and various are the words and expressions which are as the Signs and Land-marks of a Condition: So no less manifold are the Divisions and Subdivisions in the Law of Conditions themselves: But as to our purpose, we shall content our selves with a few, and reduce them all to these following; viz. Conditions are either, 1. *Possible*, and they are either *Casual*, *Arbitrary*, or *mixt*; which consist either in *Chancing*, *Giving*, or *Doing*, and are either *Affirmative* or *Negative*. Or, 2. *Impossible*, either in respect of *Nature*, of *Law*, of *Persons*, or of *Contrariety*. Or, 3. *Necessary*, and that in respect either of *Fact*, or of *Law*. And thus all Conditions relating to this subject may be reduced to one of these three Heads, viz. either *Possible*, *Impossible*, or *Necessary*. (a) As for *Captious* and *Unlawful* Conditions, they fall in Construction of Law under the second head of this Distinction. A Condition, properly so taken, respects the time to come;

(a) Sichard. in dict. Rub.

come; improperly the time present or past, (1) and it ought to refer to something that may, or may not be; for if it be subject to no Contingency either in Substance or Circumstance, it cannot properly be termed a Condition: And therefore if one make *A. B.* his Executor, or give him a Legacy of 100 *l.* if the Sun rise ten days following next after his the Testators death, the Executorship or Legacy is pure and simple, and not conditional, (2) though the Sun were not seen to appear or shine in all that time. And the Law rejects such Conditions as relate to any thing for the time past or present, that never could be true: And therefore in case the Testator make *A. B.* his Executor, if the Testators Wife and Daughter happen to be then alive at the time of making the Will, and the Testator never had any Daughter; in this case the Disposition remains valid, and the Condition of no more force or effect, than Conditions that are *Impossible*. (3)

2. *Possible* Conditions must first be accomplished before the effect can take place, (b) unless it sticks not with, nor may be imputed to the party on whom the Condition lies, wherefore such Condition is not performed; for in such Case the Condition will be accounted as accomplished, especially if the Condition be *Arbitrary*, and the party not in *Mora* nor *Culpa*, why the same is not indeed accomplished. The Law will also understand it as accomplished, if only he to whom it is to be performed, be the impediment thereof. (4) And here note, that every Possible Condition ought to be precisely observed or performed; neither is it sufficient, save in some cases, to accomplish the same by any other means, or in any other manner than is prescribed; (c) unless it may appear that the Testator did more respect the end than the means; (d) or unless the party in whose favour such Condition was made doth consent unto other means; (e) or unless the Condition be when something is disposed *in Pios Usus*, or unless the Law allows other means than the precise form which is prescribed. And therefore Regularly Conditions are to be performed in their very proper and specifical forms, (5) except in certain cases necessary to the Act of Performance: in which Case, other means than such as are prescribed will suffice, if they are equivalent to the prescribed means, and that Equivalency contains the same Reason in Law. (6) And whereas it is true in Law what hath been said, That when it doth not stand by him to whom the Condition appertaineth, wherefore the Condition is not performed, it ought to be for the most part accounted as accomplished, (f) though indeed and in truth it remains unaccomplished: And whereas this is generally true when the Condition is merely *Arbitrary*, (g) and the party to whom the Condition was injoyn'd not in fault, where-

(1) *L. cum. ad præsens. & l. itaq; ff. si certum per & Ludo. Gozed in l. si quis in conscribendo. C. de Pañtis. nu. 3.*
 (2) *Claud. Turic. in l. Prag. ff. de Poenis. nu. 24. 25.*
 (3) *Pet. Stella. super §. Augurius. T. qui Romæ. ff. de verb. Obligat. nu. 15. 18. 24.*
 (b) *L. qui hæredes. ff. de Condit. & demonst. Conditio Legato adjecta habetur pro impleta, quando non stat per Legatarium, quominus impleatur. l. 5. §. 1. quando dies Leg. Ced. & Aymo Cravetta. sup. l. cum filio. ff. de Leg. 1. nu. 263.*
 (4) *Christoph. de Castell. sup. l. si cum dotem. ff. Solut. Matrim. (c) Gloss. & DD. in l. si quis hæred. C. d. Inst. & Subst. (d) Mantie. de conjeñt. ult. vol. lib. 11. tit. 16. n. 3.*
 (e) *Simo de Prætis. de interpret. ult. vol. l. 1. fol. ult. nu. 34.*
 (5) *L. Mævius. l. qui hæred. ff. de Cond. & Demonst. (6) Fortun. Garcia. in §. & quid si tantam l. Gal. ff. de Lib. & Posthum. (f) L. cum non Stat. & c. impu- tari. de Res. jur. (g) L. q. & sub*
C. de Res. §. 1. ff. de
Res. §. 1. ff. de

(h) DD. in *Liquid* test. ff. si cert. pet.
 (i) Gloss. & DD. *ibid.* & Zas. in l. *continuuus*. §. illud. ff. de verb. Obligat.
 (k) DD. in l. *milites*. §. ult. ad Leg. Jul. de Adul.
 (l) Bart. in l. in test. ff. de Cond. & Demon.
 (m) Mantic. l. 11. tit. 16. nu. 22.
 (n) *Ibid.* nu. 23.
 (o) L. *Libertatem*. ff. de Manum.
 (p) Tyraq. de Privil. pia. Cæ. c.

fore the Condition is not accomplished; so as that an Impediment shall be said to excuse a man from delay in the matter of performance of Conditions: (b) Yet notwithstanding all this, when the Impediment may be foreseen and prevented, such Impediment shall not excuse him who doth not avoid the same. (i) But when the Impediment of performing a Condition doth proceed from the Testator himself, then the Condition is reputed for compleat, though not accomplished; and in that case it shall prejudice neither the Executor nor the Legatary. (k) In like manner, when the Impediment doth proceed from a third person, the Condition is to be accounted in Law for accomplished, (l) unless such third person were ignorant of the Testators Will. (m) But when the performance of a Condition is hindered by the Will and Providence of God, there the Law doth not allow any feigned performance, (n) except it be in favour of Liberty from Bondage (o) or Alimentation, or *ad pias causas*, (p) or except the Qualification be not *Conditional*, but only *Modal*. (q)

57. (q) Grass. Thef. Com. Op. §. Legat. q. 58.

(r) L. 2. ff. de Cond. & demon. & l. si quis hæredem. C. de. Instit. & Substit.
 (s) L. si jam facta. & l. hæc conditio. ff. *ibid.*
 (t) L. talis. ff. *ib.*
 (u) L. si quis instituat. §. 1. ff. de hæred. instit.
 (v) Bart. Bald. & Paul. de Castro. in dict. l. si quis. & dict. §. 1.
 (x) L. hæc conditio ff. de Cond. & Demon.
 (y) Bald. in l. C. de Instit. & Substit. nu. 20.
 (z) Bart. in l. Substit. ff. de vulg. Substit.
 (a) L. si jam facta. ff. de Condit. & l. si quis hæred. C. de Instit. & Substit.
 (b) L. si ita Scriptum ff. de Legib.

3. *Arbitrary* Conditions, that is, such as consist in his power on whom they are imposed, ought not to be performed till after the Testators death, (r) unless the Condition be such as cannot be iterated; for in that case it is sufficient that the same was performed in the Testators life-time, even before the making of the Testament; (s) or unless the Condition be referred to the time past. (t) Also an *Arbitrary* Condition imposed upon an Executor, may be performed at any time during the Executors life, and he meanwhile enjoy the Executorship. (u) This holds true, unless the Judge assign a certain competent time for the performance thereof; upon default whereof Administration may be committed as of one dying Intestate, till the Condition be performed: (v) But if such Condition doth appertain to a Legatary, then it must be performed so soon as conveniently he may, or else the Legacy is lost, (x) unless the Legatary were ignorant of such Condition or Legacy; for in that case no prejudice shall accrew to him by reason of such ignorance. (y) And it is sufficient for the obtaining the effect of a Condition, that the said Condition was once accomplished, though it doth not continue so. (z) And although *Arbitrary* Conditions (as aforesaid) are not regularly performable till after the Testators death, yet Conditions not *Arbitrary*, but *Casual* or *mixt*, are accounted as accomplished, though performed before the making of the Testament, provided the Testator were ignorant thereof: (a) But if the Testator were not ignorant thereof at the making of the Testament, then it is otherwise, and the Condition remains to be performed. (b) For when the Condition

dition is merely *Casual*, the same is neither accounted for accomplished nor extant in presumption or fiction of Law, neither for unaccomplished or deficient, until the actual event of the same Condition doth first come to pass. (c) Indeed an *Arbitrary* Condition is divers times accounted for accomplished in Law, though not in Fact: But a *Casual* Condition is not accounted for accomplished or extant in Law, unless the same be accomplished in fact also. (d) And such must be accomplished, before a Legacy can be due; And in case the Legatary happen to die before the accomplishment of such *Casual* Conditions, the Legacy is quite lost, and cannot be transmitted to the Executors or Administrators of such Legatary. (e) And in *mixt* Conditions it is in this Case as in Conditions that are merely *Casual*. (f) But *Arbitrary* Conditions are such as merely depend on the power of him to whom they are injoynd, and depend not on the Power or Fact of any other person, nor are subject to any Incidents of Chance or Fortune: (7) For which reason, that *Condition* is not accounted *Arbitrary*, whose event may be impeded by several Fortuitous Casualties. (8)

4. Again, of the *Possible* Conditions, some be *Affirmative*, some *Negative*: When the Condition is *Affirmative*, the Executor or Legatary cannot obtain the Executorship or Legacy, so long as the *Possible Affirmative* Condition dependeth unfulfilled, though they should put in sufficient Bond to make Restitution, in Case the Condition should be deficient, (g) unless such *Affirmative* Condition doth secretly imply or contain a *Negative*, (h) which consisteth in *Doing* or *Giving*; or when the Disposition is not made *sub Conditione*, but *sub Modo* only: (i) But when the Condition is *Negative*, the party on whom the Condition lies may be admitted to the effect of the Condition in the mean time, or during the dependance of such *Negative* Condition, he first entring into Bond or Caution to make Restitution, in case the Condition be not performed. (k) For if the Condition be *Negative*, consisting in not *Doing* of some thing, and cannot be performed so long as the person liveth, on whom it was imposed, then may he obtain the Legacy, by giving in Caution to accomplish the Condition, or not to do that which by the Condition was prohibited; otherwise, in default thereof, to make full Restitution. (l) But if the *Negative* Condition be such as may be performed during his life on whom it is imposed, then is not such Caution to be given. (m) And if ever a *Negative* Condition be reduced to an Impossibility, it is then accounted as accomplished, (n) because it is then brought into such a state, as that it is not capable of being infringed. Also if the *Negative* Condition consist in not *Chancing*, then likewise is the foresaid Caution not to be admitted. (o) Lastly, when the Condition is *Affirmative*, then it is to be understood of the first Act of performance

(c) L. unica. §. si autem. C. de Cad. rol.

(d) Ibidem.

(e) L. liber §. si ita ff. de hered. instituend.

(f) Dict. l. si quis heredem. C. de Instit. & Substit.

(7) Mar. Salom. in §. si ejus qui l. Gallus. ff. de Li. & Pest.

(8) L. sius quæ ff. de hered. instituend.

(g) L. Murian. ff. de Cond. & Dem.

(h) L. pater. §. Socrus. ff. ibid.

(i) L. i. c. de his quæ sub modo &c.

(k) L. Murian. ff. de Condit. & Demon.

(l) Ibidem.

(m) L. cum tali §. i. ff. ibid. & l. pater. §. Socrus. ff. ibid.

(n) Gros. & DD. in dict. Muriane.

(o) Ibidem.

(6) L. hoc genus.
ff. de Cond. &
Demon.
(7) Barthol. Ca-
lepius in l. si is
qui ducenta. ff. de
reb. Dub. nu. 25.
(10) L. cui fun-
dus. ff. de Cond.
& Demonstr.
(11) L. 2. in fine.
ff. de Condit. &
Demon.

(q) Mantic. de
Conject. ult. vol.
lib. 11. tit. 16. n.
23.

(r) L. illa ff. de
hared. instit.
(1) L. fidei com-
miss. ff. de fidei.
commis.
(12) Hier. Buti-
ge la, in l. impos-
sibilis. ff. de verb.
Oblig. nu. 13.

(t) L. si pupillus.
§. qui sub Condi-
tions. De Nover.

mance only ; but when the Condition is *Negative*, then not on-
ly the first Act, but also the Second, Third, and every other Act
is perpetually forbidden. (p) Only if it be an Alternative *Nega-
tive* Condition, it is sufficient if either part be secured from being
infringed. (9) Yet it is not enough to perform a Condition on-
ly in part, because *Conditio* in Construction of Law is an *Indivi-
dual*. (10) Nor will the Fulfilment of a Condition merely by
Chance or Fate, any thing advantage him who stood personally
obliged to perform it. (11)

5. *Impossible* Conditions, be it in either of the four former re-
spects ; viz. either in respect of Nature, of Law, of Persons, or of
Contrariety or Repugnancy, are in themselves void, and work no-
thing as to any hinderance either of Executorship, or of Legacy ;
But the Condition which was not impossible at first, yet becom-
ing impossible afterwards, is not void in it self, yet maketh void
the disposition whereto it is annexed. (q) Also under this head
fall all unlawful Conditions, and such are contrary to good man-
ners ; for what is unlawful to be done, the Law will have us to
understand as impossible to be done, and not only Conditions
simply unlawful, but also all *Captious* Conditions ; for when the
Condition is repugnant to the nature of the Disposition it self, it
is then a *Captious Condition*, and is of no force ; for all *Captious*
Conditions are void ; so are all *Captious* Wills and Testaments ;
as when the Testators Will dependeth on the Will of another, it
is a *Captious* Will, and of no validity, (r) unless it be in favour
of Liberty, or *ad Pios usus*. (s) These *Impossible* Conditions, though
Negatively made, do in effect of Law differ nothing from a Con-
dition altogether in being, and already extant : Inasmuch, as that
they are so far from vitiating or nulling an Executorship or Lega-
cy, that they do not so much as suspend either. (12)

6. *Necessary* Conditions are all of no force, whether they be
Necessary in respect of *Fact*, or such as cannot but come to pass, or
whether they be *Necessary* in respect of *Law* ; for in vain doth the
Testator annex that as a Condition to the Disposition, which the
Law requires without : For as in Construction of Law, that is
deemed as impossible which the Law prohibits ; so likewise is
that deemed as necessary which the Law absolutely requires ; there-
fore when the Condition is in either extreme, that is either ne-
cessary or impossible, such hindereth not as to any suspension of
the effect ; but it is as if any such Condition had not been at all
expressed. (t)

C H A P. XV.

Of Testamentary Conditions in reference to Marriage.

1. *Conditions against the Liberty of Marriage, unlawful.*
2. *Condition of Marrying with the Consent of another, how far lawful, or not.*
3. *A Case in Law touching this Subject.*

1. **A**LL Conditions against the Liberty of Marriage are unlawful; (a) but if the Conditions are only such, as where by Marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place or person, then such Conditions are not utterly to be rejected. (b) Thus an Executor or a Legatary made on some Condition against the Liberty of Marriage, may notwithstanding the non-performance of such Condition, obtain the Executorship or Legacy: (c) Yea, if the Testator make one his Executor, or give him a Legacy upon condition, that he marry with the consent, and according to the good liking or appointment of some other person, this Condition is unlawful. (d) Inasmuch, that if such Executor or Legatary marry contrary to such Restraint or Condition, he shall notwithstanding be admitted to the Executorship, and receive the Legacy, as if no such Condition had been expressed. (e) Q. Whether he be not obliged to ask his Consent, though not to follow it? For the Law rejects all Conditions made against Marriage, or that are Impediments to Marriage; notwithstanding which, an Executorship may be assumed, or a Legacy demanded, as if no such Condition had been made. (13) Yet an Annuity bequeathed by a Man to his Wife for so many Years, if she shall remain after his death a Widow, and unmarried, it is good. But suppose a man having in his Will bequeathed such a Legacy to his Wife, so conditioned as aforesaid, do after in the same Will say, *Item*, I give unto my Wife the Dwelling-house wherein I now live; or, I give unto her the one half of my Household-stuff: The Question is, Whether these latter Legacies be pure and simple? or, Whether the foresaid Condition, relating to her Widowhood, shall be understood as repeated therein? The Decision is in the Negative; the Reason is, because the former

(a) Vigel. Method. jur. Civil. part. 4. l. 14. c. 3.
 (b) L. cum ita. & l. hoc modo. & l. fed si. §. cum vit. ff. de Cond. & Demon.
 (c) L. quoties ff. ibid. & l. 2. C. de Indict. vid.
 (d) L. cum tale. §. si arbitratur. ff. ib. & Gravet. Confil. 1. n. 3. & Mant. l. 11. tit. 18. nu. 8.
 (e) Gravet. & Mant. ibid. & Perkins de Test. Conjug. l. 1. c. 24. n. 6.
 (13) L. Quoties. & l. cum tale. §. rescriptum ff. de Condit. & Demonst.

(14) Jo. de Bartonib. is an Annual and Successive Legacy, congruous to a vidual state, the other not. (14)
 super Rubr. c. de Secund. Nuptiis nu. 101. & nu. Seq.

2. Notwithstanding what hath been said, the Condition holds good, if the Testator make one his Executor, or give him a Legacy if he marry not without the Counsel or Advice of another person : So that the Testator giving him a Legacy if he marry with the Counsel or Advice of another person, he is excluded from the Legacy, if he marry without such Counsel or Advice ; (f) yet in this Case he is not bound to follow such Counsel or Advice, but only to request the same. (g) Again, although the Condition of marrying with the Consent of another is void, so as the party on whom such Condition is imposed, may obtain the Legacy without such consent, yet marry he must, or he cannot obtain the Legacy ; for although the Condition of such Consent be unlawful, yet must he marry before he can pretend to the Legacy, because that part of the Condition is not unlawful. (h) And thence also it is, That a Condition, under which a Woman is appointed Executrix, if *A. B.* marry her, is held as not accomplished, and she is not Executrix, if *A. B.* refuse Marriage with her. (15)

3. A Legacy of 50*l.* is bequeathed to *A. B.* when she shall be married, she dies unmarried, or before Marriage : In this Case her Executor shall not have the 50*l.* But if the Testator saith, I give *A. B.* 50*l.* towards her Marriage, in that case her Executor shall have it, albeit she die unmarried. (1)

(f) Mantic. ubi supra.
 (g) Paul de Cast. Conf. 300. vol. 1. & Felin. in c. 10. part. de Constit. Ext. Col. 2.
 (h) Mant. de Conject. ult. vol. l. 11. tit. 18. nu. 8.
 (15) Signorol. de Homod. super. l. cum avum. Cod. de Instit. & Subst. nu. 21.
 (1) Brown l. 1. 32. Bulstr. 2. 126.

C H A P. XVI.

Of the manner of Proceeding during the suspension of the Conditions.

1. *The Condition depending, Administration may be committed to the Conditional Executor.*
2. *The Law what, in case the Condition be not performable by the Executor, on whom it is imposed.*
3. *The difference in Law between a Potestative Condition annexed to an Executorship, and that which is annexed to a Legacy.*

1. **T**hat Creditors and Legataries may have remedy during the suspension of the Condition of the Executorship or Legacy, it is lawful for the Judge to commit Administration to him that is conditionally assigned Executor, yet only for so long time as the Condition dependeth and is not extant, or else deficient; (a) and when the Condition is extant, he may prove the Will, and detain the Goods of the deceased, as Executor to the Will; but if the Condition be infringed, or utterly deficient, then ought he to make Restitution to the next of Kin to the deceased, or to those to whom belong the Administration of his Goods; (b) for by breach or defect of the Condition, the deceased is reputed to have died Intestate, or as if he had never made an Executor; (c) And the former Administration being forfeited, a new may be committed; (d) But if the Conditional Executor will not meddle with the Administration of the deceased's Goods, when the Condition is performable, then may the Judge assign the Conditional Executor a competent time for the accomplishment of the Condition; within which time if it be not performed by him, and if it be within his power, it may be imputed for infringed or deficient, provided that other time for the performance of the Condition be not assigned in the Condition it self. (e) And in case of such Infringment or Deficiency, Administration may be committed according to the Statute, as of one dying Intestate. (f) But if the Judge knowing of this Will, doth commit Administration to some other without the Executors knowledge, or without appointing him some competent time for the accomplishment of the Condition, then is the Administrator in hazard of being sued by the Executor in an Action of Trespass, unless the Executor did formerly refuse. (g)

(a) L. si quis instituitur. §. 1, 2. ff. de hæred. instituend.

(b) L. 2. §. si sub Conditione. ff. de bonor. possess.

(c) L. hæres. ff. de acquir. hæredit.

(d) L. si quis instituitur. ff. de hæred. instituend.

(e) Bart. Bald. & Paul de Castr. in ff. de hæred. instituend.

(f) Stat. 21. H. 8. c. 5.

(g) Abridg. dez. Caf. Edit. Anno. 1599. tit. Administr. fol. 183 n. 1.

2. If the Condition be such, as that it doth not lie in the power of the Executor to perform the same, then they may judge at the Petition of the Creditors, assign a time to such Conditional Executor to undertake the Administration of the Goods, which if he neglect or refuse, then may the Judge, after such time elapsed, commit the Administration to such as have Interest, until such time as the Condition be either extant or deficient; or else (as some think) the Judge may grant a Letter *ad Colligendum* to some other person than the Conditional Executor. But then note, that such person as hath such Letter *ad Colligendum*, not being Administrator, the Actions which otherwise might be brought against the Administrator, may now lie against the Judge. (b) And though the Judge may grant his Letter *ad Colligendum*, yet he hath not power to give Authority to sell any of the said Goods, though perishable. (i) And if such person to whom such Letter *ad Colligendum* is granted, should by virtue of such power sell any of such the said Goods, he is suable as Executor to his own wrong. (k)

3. When a Testator appoints an Executor, or bequeaths a Legacy under a Condition, not only *Possible*, but also *Potestative*, that is, such as is in the power of him to perform on whom it is imposed, and the Will silent as to the time of the performance thereof, not expressing when it shall be fulfilled: In this case, the Law puts a difference between such a Condition annexed to the Institution of an Executor, and that which is annexed to a Legacy: For if it be annexed to the Executorship, and the Executor defer or delay the performance of such a Condition, the Judge at the instance of the Testators Creditors, may assign him a day, by or within which he shall fulfil the Condition, and take upon him the Administration of the Testators Goods: But if such a *Potestative* Condition be annexed to a Legacy, and no time set in the Will for the performance thereof, the Legatary is obliged to fulfil it as soon as he can: So that in this case the Judge assigns no term, because the Law assigns it; and the Reason in Law of this difference, is, Because unto the one, *viz.* the Legatary, there accrues a certain profit or advantage; but the other, *viz.* the Executor, assumes a certain burthen, and runs the hazard of an uncertain damage. (l)

(h) *Terms of Law.*
verb. Administ.
& Broo. Abridg.
tit. Ordinarii. nu.
13 & Abrid. dez.
Cases, fol. 176.
uu. 12.

(i) Dyer. fol. 256.
& Abridg. ibid.

(k) Dyer. ubi supra.

(k) Bart. Bald.
& alii DD. in L.
si quis institui-
tur. ff. de hæred.
instituent.

C H A P. XVII. Of Testaments void.

1. *By what means Testaments are void originally.*
2. *By what means they become void afterwards.*
3. *Law-Cases pertinent to this matter.*

1. **A** Testament may be originally void, or voidable, wholly, or in part, through some original defect; as thus: First, Because the Testator is such a Person as cannot make a Testament. (a) Secondly, Because the things bequeathed are not devisable by Will. (b) Thirdly, Because the manner of the Disposition is unlawful. (c) Fourthly, Because the Person made Executor is incapable thereof. (d) Fifthly, because the Testator was compelled by Fear, (e) or circumvented by Fraud, or overcome by immoderate Flattery, (f) or induced by some other unlawful means to make his Will. Sixthly, Because of Error, Uncertainty, or Imperfection. Seventhly, Because the Testator had not *Animus Testamentandi*. (g)

2. A Testament, though free from all Original Fault, may yet afterwards become void. As first, By making of a later Testament. (b) Secondly, By cancelling or revoking that which is made. (i) Thirdly, By some alteration of the State of the Testator. (k) Fourthly, By forbidding or hindering the Testator from making another Testament, or from correcting the former. (l) Fifthly, By unwillingness or inability of him that is appointed Executor, when he will not, or cannot officiate as Executor. Sixthly, When the Executor cannot be certainly known, there being divers Men of that Name, and no distinction made; this uncertainty of the Executor maketh void the Will. Seventhly, When the Testator doth err in the Person of the Executor; but in an Error of the Name only, and not of the Person, it is otherwise, save in certain Cases hereafter limited. Thus a Testament, though free from all original fault, may yet afterwards become void; but a Testament originally void, can never afterwards be made good.

3. Error upon a Judgment given against the Plaintiff in *C. B.* on a *Formedon*, in Remainder, upon special Verdict, and found that *D.* gave Instructions for the writing of his Will, to give his Lands to one of his Sons for Life, and the Scrivener by mistake wrote an Estate in Fee; and the Court agreed, that the Will was utterly void, because it was not the Will of the Testator. Yet it

seem'd to *Fenner* Justice, that for so much as it may be, it should be ; that is, for an Estate for Life, which was his Will : But all the other Justices were against him.

The Case of the Co-Heirs of Sir Will. Rider, in the Court of Wards. Moor Rep. iii. 1222.

In the Court of Wards, between the Co-Heirs of Sir *William Rider*, it was declared by *Coke* Chief Justice of the C. B. and *Tanfield* Chief Baron, That if one make his Will in writing, and then says, I will alter it, or add to it ; that is not his Will, because it is not compleat, or finish'd, nor publish'd for his Will, but is deferr'd or delayed till the Alteration or Addition be made to it. And if the Party die before such Alteration or Addition, and without publishing it to be his Will, that Will is not his Will. But if he make his Will, and publish it, and after it come to his Mind to alter or add to it, and he say that he will alter it, or add to it, but dies before he make any Alteration or Addition, then the former shall be his Will. Whence it is, that by the same Author it is reported, That if a Man make his Will in writing, and after declares, that he will add to it, or alter it, this is not a good Will, because not compleat nor published for his Will. But if a Man publish the Will that he hath made, and after it comes into his Mind to add to it, or to alter it, and says, he will so do accordingly, but dies before any addition thereto, or alteration thereof ; in this Case the Will he published shall stand for his Will (1)

(1) More. Case 1156.

(2) Vid. *Latus. Brownl.* 2. 8c. 151. 147. 4 H. 7. 13. *Flow.* 202.

If there be a false Will, and a true Will exhibited both at once, and the Person named Executor in the false Will, get the *Probat* to his Will first ; and afterwards the Executor of the true Will doth disprove and avoid the first false Will : In this Case he may also avoid all Acts done by that fraudulent Executor. (2)

C H A P. XVIII.
Of Testamentary Revocations.

1. *Whence they do most usually proceed, and the more common Causes thereof.*
2. *The several kinds of Revocations.*
3. *Revocations by Marriage.*
4. *Where two Wills are found, and it be not known which was made first or last, which shall be presumed the later Will.*
5. *In what Cases the former Will stands unrevoked, notwithstanding the making of a later Will.*
6. *Cases in Law touching Revocations.*

1. **R**evocations Testamentary, are either such as are made by the Testator himself, and are of his own proper meer will and pleasure; or such as are by the Law; and besides, yea possibly contrary to the Testator's Will and Intention. The former of these is either by some verbal Declaration, or by making a later Will, or by doing some other Act amounting to the effect of a Revocation: The later of these is fourfold, or doth arise from a fourfold Cause, and comes to pass either for want of sufficient Proof, or by reason of Disinheritance (not practicable with us in that sense, though very frequent in the Civil Law, under the Notion of Preterition;) or because of some Capital Crime, for which the Testator suffered death according to Law; or that the Executor (or all of them, where there are more than one) refuse to Prove the Will, or Administer to the Testator's Goods: But this last is not such a Revocation in Law properly, as nulls the Substance of the Will; but rather only works an Avoidance of the Form of the Schedule as a Will, whether written or nuncupative: And indeed none of these seem so much to be Revocations as Annulations in Law.

2. *Revocations* may be either of Executorship, or of Legacies; and that either in whole, or in part; and this may be either by Word, or by Deed, or by Act and Operation of Law, or by Marriage. The Testator at any time before his death, hath power to revoke or alter his Will at his pleasure (a) And as a Will may be made by word only, so even a written Will may by word alone be revoked and annulled. (b) For by making a Nuncupative or Verbal Will, one may revoke a written Will; yea, one may by word only express the alteration of his Mind thus far, That the Will by him formerly made, shall not stand, but be revoked and

(a) Bald. in l. Sancimus. C. de Testa. & Mant. de Conject. ult. vol. 1. 2. 1. 15.
(b) Offic. Exer. § de Revocat.

(c) Ibid.

annulled ; and this shall stand and be effectual : (c) So that if he then die without making a new Will, or a new Publication or Re-affirmance of the former, he dieth Intestate. But a Will advisedly made, shall not be nullified by doubtful Speeches of the Testator, without clear and perspicuous Revocation, or words which *tant amount*. (d) Nor can there be a Revocation of Legacies among Children, without precise mentioning the first Will, and the Legacies thereby given to the Children. The Law is the same, when the Testator having no Children, deviseth Legacies to his Brothers.

(d) Cro. Rep.
Caf. Eyres vers.
Eyres in C. B.

(e) Ibid.

(e) And as a Will may be wholly revoked, so also in part only. Also the Executorship of one or more of the Executors may wholly or in part be revoked, and yet the Will may stand good in all the other parts, so as there be any one, or more Executors left unrevoked ; but if all the Executors be revoked, then the whole Will is revoked. And this Revocation (as aforesaid) may be by word only, without being expressed in the Will, or any other writing.

(ff) Bald. Paul de
Castr. Mantic.
Alex. Jason. Dy.
cum multis aliis.

(g) 6 Ed. 6. Dyer.
& Gold. Rep. in
Caf. Gibson. vers.
Platoffs. & Cro.
Rep. in Cafe
Hodginson vers.
Whood in C. B.
(h) Offic. Exec.
ubi supra.

(f) Likewise Revocations may be by Act and Operation of Law as well as by Fact, or by any direct and express Terms ; as thus, when the Testator maketh a Feoffment to one Man of the same Land by Deed, which he had formerly devised or bequeathed to another by Will. (g) Also if one bequeath his black Horse by Will, yet afterwards selleth or giveth him away, and buyeth another black one ; this later black Horse shall not pass by the Will, because the Testator had him not at the time of making the Will, as also because such his sale or gift of the former black Horse, was an actual Revocation of his Bequest or Legacy thereof.

(b) The like of Corn in the Barn, or other thing whereof the Testator makes any Act of Alienation contrary to the Disposition thereof in his Will. Lastly, Although a Testator may by word revoke a Will made in writing that is good, yet he cannot by word affirm a Will made in writing, that in it self is void. And therefore albeit a Devise of Land in writing, may by a subsequent verbal Declaration be revoked, or by any Act contradicting such Devise, yet a Devise so made void, or void in Law, cannot be made good by any such verbal Declaration subsequent to such Countermand : And therefore if one devise his Land to A. B. and his Heirs, and after A. B. dies in the Life-time of the Testator ; in this case, albeit the Testator should verbally declare after this, That the Heirs of A. B. shall have it, the Heirs of such Devisee will not enjoy it. (1)

(1) Plow. 50.
341, 344, 346.

(i) Ibid.

3. There are likewise *Revocations* by Marriage ; as thus : If a Woman Sole make a Will, and afterwards take a Husband, this, without any more, shall work a Revocation, or Annulment. (i) But in case the Husband be bound, or covenanted to make good, or perform the Woman's Will, which if he afterwards refuse to do, his Bond or Covenant stands good against him, and is also suable,

uable. (k) Yet a married Woman cannot by word countermand and revoke her Will formerly made when she was sole and unmarried, by reason of the Coverture taking away the freedom of her Will. And if the Husband doth give his Wife License to make a Will of his Goods, yet he may revoke the same, not only at the making of the Will, but also after her decease, at least before the Will be proved. (l)

(l) Supra, cap. 10. § 2.

4. No Man can properly be said to die with two Testaments, except a Field-Soldier in actual Service: (m) Yet a Man may make two Testaments, and both stand good, and both be proved, provided they be of, and as touching distinct and several things, and the Executors thereof limited accordingly, and the one no way derogatory to the other: (n) But of the same things there can be but one Will, for the last rescinds all former Wills. (o) Yet a Man may die with divers Codicils, and the later doth not infringe the former, so long as they be not contrary the one to the other. (p) But if two Testaments be found, and it appear not which was the latter, both are null and void: (q) yet if one of them be made *inter Liberos*, or *ad Pios usus*, that shall be presumed to be the later, and so take place; yea, or if one of them be made in favour of such as ought to have had the Administration in case of Intestation. (r) But if one of them be in favour of the Testator's Children, or of them that ought to have had the Administration, and the other be *ad Pios usus*; in this case if they that should have had the Administration be the Testator's Children, then that shall take place: (s) Yet that *ad Pios usus* shall have Priority of a Testament of the same date made in favour only of collateral Kindred. (t) But if two Codicils be found, not appearing which was made first or last, and one and the same thing be given to one Person in one Codicil, and to another Person in the other Codicil, in this case the Codicils are not void, but the Persons therein made Legataries, ought to divide the Bequest equally betwixt them. (u)

(m) L. Quærelatur ff. de militari Testa.

(n) Offic. Exec. (o) L. posteriore. Inst. quib. mod. Testa. infir.

(p) L. cum proponat. C. d. Codicil. (q) L. ult. & ibi DD. C. de Edict. Divi Adrian.

(r) Sichard in dict. l. ult. & Mant. l. 2. t. 15. nu. 17.

(s) Mint. lib. 6. tit. 3. nu. 48.

(t) Idem per l. Sancimus. c. de Sacrosanct. Ecl.

(u) Gloss. & DD. in l. cum proponat. C. de Codicil. & Graff. Thes. Com. Op. § Codicillus.

5. The former Will shall stand good and unrevoked, notwithstanding a later Will, in case the later Will be voidable by any ways or means whereby Wills become void, and the former be without any such just Exception; (w) or in case it be justly suspected that the Testator was circumvented by fraud, or compelled by violence to make that later Testament: (x) Or in case in the former Will there be inserted a Clause derogatory of not making any other Testament, and sufficient mention, or express Revocation thereof be omitted in the later: (y) For if in the former Testament there be a Clause Derogatory of Wills and Testaments afterwards to be made, as if the Testator says, VVhatsoever Testament I shall hereafter make, I will the same to be void, and of

(w) § ex eo Inst. quib. mod. Testa. infirm. & l. Sancimus. C. de Test.

(x) Sino de Præcis. de interpretat. ult. vol. lib. 4.

(y) Gloss. in l. si mihi & tibi ff. de Legibus.

(z) Ibid. & Jason
in l. Horatius. ff.
de Liber. posthum.
Mich. 38, 39 Eliz.
B. R. per Popham.
Roll. Abridg. tit.
Devise. P.
(a) Jul. Clarus. §.
testamentum. q.
29.

no force: In this case it is not infringed by a later Testament, unless in that later there be mention thereof sufficiently made to amount unto a Legal Revocation of that former Testament or Clause Derogatory. (z) In such Clauses Derogatory, the Law doth distinguish between those that refer to the Testator's VWill, and such as relate only to his Power: (a) For instance, the Clause is Derogatory as to the Testator's Power, when the words respect his Power; as thus, *I will not be able to make another Testament*; or, *I will not be able to revoke this Testament*: And when the words respect his Will, the Clause is Derogatory as to his Will; as thus, *If I shall hereafter make any other Testament, I will not have it to stand*. Now it is regularly held, That a former Testament is revokable by the later, albeit in the former there be a Clause Derogatory as to the Testator's Power, and that Clause not revoked in the later; otherwise it is in case of a Clause Derogatory as to the Testator's Will; which being in the former Will, makes it not revokable by a later, unless in that later there be a special Clause Derogatory to that Clause in the former.

(b) Jul. Clar. ib.
& Auto. Faber. in
suo Codice. l. 6.
tit. 5. def. 15.

(b) And hence it is, That if a Testator doth declare in this manner, viz. *I will that this shall be my Last-Will and Testament, whereof I will not have it in my power to repent, or to make any other Will*: Such Clause hath no Operation in Law, for that it is not in any Man's Power to deprive himself of the liberty he hath of making a Testament, nor can any way be imagined whereby a Testament should be become unalterable or irrevokable, (c) in regard the Will of a Testator is Ambulatory, *Usque ad extremum vite exitum*.

(c) Menoch. de
Præf. lib. 4. cap.
166.

6. If a Man saith, That he will revoke his Will hereafter which he hath made, that is not any Revocation, without the doing of some other Act. Likewise, if one saith that he will make a Feoffment thereof to another, that is no Revocation before it be done: But if a Man devise Land to another by his Will in writing, and after devise it unto another, *per Parol*, albeit that is void as a Will, yet it is a Revocation of the former Will.

Roll. ibid. R.

If a Devisor alien the Land devised, and afterwards purchase the same Land, yet the Will is revoked as to that Land, 44 E. 3. 33. 34 Aff. D. 3, 4 P. M. 143. 55. Contra. 2 R. 3. 3. b.

Pasch. 4 Jac. B. R.
Symphon. verf. Kir-
son. Cro. Reg.
Par. 2. Pl. 2.

Trespas upon Evidence, where one hath made his Will in writing, and devised his Land to A. and her Heirs; and afterwards being sick and lying upon his Death-bed (because A. did not come to visit him) affirmed, that A. should not have any part of his Lands or Goods. It was held by all the Court, that it was not any Revocation of his Will, being but by way of Discourse, and not mentioning his Will. But the Revocation ought to be by express words, that he did revoke his Will, and that she should not have his Lands given unto her by his Will, or such-like words which might

might shew his intent to make an exprefs Revocation thereof.

Ejectione Firme. Upon Evidence to a Jury it was resolved by Mich. 16 Jac. B. the Court, and so delivered to the Jury, that if one makes his *Will* R. Fitzhugh Cr-
in writing of Land, and afterwards upon Communication saith, *That he hath made his Will, but it shall not stand; or, I will alter* Cro. Rep. par. 2.
my Will; &c. These words are not any Revocation of the *Will*, Pl. 3.
for they are words but in *futuro*, and a Declaration what he intends to do: But if he saith, *I do revoke it, and bear Witness thereof;* he doth hereby absolutely declare his purpose to revoke it in *presenti*, and it is then a Revocation: Also *Montague* said to the Jury, and it was not denied by any other of the Justices, That as one ought to be of a good and *Sane Memory* at the disposing, so ought he to be of as good and *Sane Memory* when he revokes it: And as he ought to make a *Will* by his own Directions, and not by Questions; so ought he to revoke it of himself, and not by Questions.

C H A P. XIX.

Of a Reviver of a Will, or Devise revoked.

1. *How a Will or Devise null or revoked, may be revived.*
2. *How an Executor revoked may be revived.*
3. *Two Testaments of the same Date, but of divers Tenors, what the Law in that case.*
4. *How one may die both Testate and Intestate.*
5. *Cases in Law touching this subject.*

1. **O**F a Will revoked there may be a Reviver by a new Publication of that revoked *Will*; also a *Will* revoked may, without making a new *Will*, be revived and set on foot again by annexing a Codicil thereunto, (a) or by adding any thing to the *Will*; or by making a new Executor; or by exprefs speech and word, that it shall stand good and be his *Will*, yea, and sometimes without either of these; as thus: A Man makes his *Will*; many Years after he makes another, then in his Sickness both these *Wills* are put into his Hands; and being demanded, which of these two he he will have to stand for his *Last-Will* and *Testament*, and being required to deliver back that which he will have to stand, and to detain the other in his Hands, he delivers back the *Will* he first made, possibly many Years before the later: In this case the former *Will*, though once made void by the later, is now revived again, and shall stand as the Party's *Last-Will* and *Testament*. (b)

(a) Traſt. de Offic. Exec. §. de non Publicat.

(b) Ibid. & 44 E. 3. fol. 33.

2. If one of the Executors Names be stricken out of the *Will*, and afterwards a [*set*] be written over it by the Testator, or by his appointment, he is then a revived Executor : But then note, that if the [*set*] shall stand good, the Executor's name over which it is written, ought not to be so blotted out, but that it may be read and discerned, otherwise the [*set*] is over nothing at all. Or if the Testator express by word in the presence of witnesses, that the party put out shall yet be Executor, he is then also a revived Executor. Lastly, If the verbal re-affirmance renew the Executorship, then is the *Will* partly in writing, partly nuncupative, his Name not being to be found in the written *Will* ; for the appointing of the Executor, doth create the *Will*, though it hath not life 'till the Testator's death ; which is Divinity as well as

(c) Heb. 9. 16, 17.

(1) Ang. Match. de

Legat. l. 4. c. 1. nu.

17. Mant. l. 2. tit.

15. nu. 17 Menoch.

de Astipif. poss. in

Remed. 4. Ro. 781.

Jul. Clar. § testa-

ment. 100. Gras.

§ testamentum.

§ ult.

(2) Menoch. ubi

supra & l. 1. §.

Sed si ff. De Bon.

possef. secund. tab.

(3) Menoch. &

Mantic. ubi su-

pra Match. de

Astipif. Decif. 383.

nu. 6. & alii DD.

(4) L. cuerebatur.

ff. de Testa. Milit.

& Menoch. dist.

Remed. 4. nu. 785.

(5) Menoch. ib.

nu. 786. & dist.

Præf. 13. & Mant.

ubi supra. & Pet.

Greg. l. 44. c. 1.

nu. 9. & Matth.

ubi supra.

(6) Menoch. ib.

nu. 789. Maschard.

Concl. 1176. nu. 25.

Mantic. l. 6. tit. 3.

n. 44. & Mar-

theac. ubi supra.

(7) Menoch. ib.

nu. 792. & de Præf.

13. Pet. Greg. ubi supra.

Masch. Concl. 410. n. 26.

(8) Masch. Concl. 1176.

nu. 37. (9) Matth. ubi supra.

& Menoch. nu. 1793.

(10) Maschard. Concl. 1176. nu. 39. Mant.

l. 6. tit. 3. nu. 42. Menoch. dist. Remed. 4. nu. 784.

Law. (c)

3. If there be found two Testaments of the same date, but of divers Tenors, and it cannot be known which was first made, both are void ; (1) unless they are both under one Seal (Sealing being required by the Civil Law ;) in which case they are both reputed but as one Testament, and the Executors in both are Joynt-Executors. 2. Or unless in one of them such are appointed Executors as were next in Law to have succeeded, in case of Intestation. 3. Or unless they are Military Testaments ; because a Soldier in actual Service is privileged for two Testaments, and both may be good. (4) Or unless the one of them is made to *Pious Uses* ; which in all Cases of doubt ever prevails ; (5) yea, though the Executor mentioned in the other Testament were in possession. (6) Or unless in one of the two Testaments be written the very hour of the day wherein it was made : In which case, this shall be preferr'd before the other ; (7) albeit that other were (as aforesaid) to *Pious Uses*. (8) Or unless in the one (neither being to *Pious Uses*) the Executor appointed is in Possession, the other not ; in which case, he in Possession is preferred before the other : (9) But if one of the two Wills of the same date be to *Pious Uses*, and in the other such be appointed Executors as were to succeed *ab Intestato* in case the deceased had died Intestate, the Law will presume of these two Testaments, That to be the last, wherein such are appointed Executors as were to succeed *ab Intestato*, specially if they were the Testator's Children that are therein made Executors : But if they are only of Kin to him by a Collateral Line, then *ad Pios usus* will be preferred, unless such Collateral Kindred were both Poor and in Possession, or Poor, though not in Possession : (10) But if such Testaments of

one and the same date be both of them to *Pious Uses*, then that which hath most of *Piety* shall have the prevalency. (11)

(11) *Matth. ubi supra.*

4. If a Man seized of Lands in Fee-simple, dispose of the same, or part thereof, by his Will in writing, it shall stand good for the whole, or part, according to the difference of Tenure, though no Executor be named or appointed; (d) so that the Party shall die Intestate as touching his Goods, whereof Administration is to be committed, (e) yet shall have a Will as touching his Lands, because Land is not properly Testamentary. (f) And so a Will may be good in part only. (g) But where the strictness of the Civil Law is observed, there a Man cannot die partly Testate, and partly Intestate; (h) tho' here in *England*, where that Ceremonial strictness is not observed, but all Immunities enjoyed, being not obliged to any other Observance in making of Testaments, than what is *Juris Gentium*, (i) a Man may thus, and several other ways, die partly Testate, and partly Intestate. (k)

(d) *Ratio est Stat.*

32 H. 8. c. 1.

(e) *Stat. 41 E. 3.*

c. 11.

(f) *Offic. Exec.*

c. 1. §. 1.

(g) *Goldsb. Rep.*

in *Caf. Oibson ver.*

Platlassi.

(h) *Dec. Cognol.*

& *Hier. Fran. in*

l. jus nostrum. ff.

de Reg. jur.

(i) *Tract. de Rep.*

Angl. lib. 3. c. 7. (k) *Brook. Abridg. tit. Exec. & Plow. in casu inter Greisb. & Fox. & Socin. Reg. & Fallen. Reg. 495. ubi 22. Casus in quib. pot. quis decedere pro parte Intestatus.*

5. A VWill countermanded, in Construction of Law, may yet be revived by some such Act of the Testator as the Law will hold to be a new Publication thereof; as thus: A Devise is made of some Land in Possession, and some in Reversion, and a Feoffment is after made of all the Land by Livery of the Land in Possession, without Attornment of the Tenant of the Land in Reversion: It was held a *Countermand* of all. But the writing of the Name of another Executor in this VWill, after this Livery, is a new Publication of the VWill, and shall pass the Land. (1)

(1) *More, Cafe*

599. *Mountague v.*

Jeffrey's.

A Devise was to one, and the Heirs Males of his Body, the Devisee died in the Life-time of the Devisor. After this the Devisor spake these words; viz. *That he would that his Will should be in force for the Issues, as if the Devisee had survived him*: And this was held a new Publication, that made the VWill good without any writing. (2)

(2) *More, Cafe*

476.

If a *Minor* within Age, devise his *Lands* or *Goods*, and publish his VWill, and after that he comes to full Age, doth publish and approve it again: In this Case the Devise will become good; otherwise, in case he doth not re-publish it when he comes to be of full Age. (3)

(3) *Plow. 344.*

C H A P. XX.

Of the Probate of Testaments.

1. *Where, and before whom the Will is to be proved.*
2. *By whom, and at whose instance the Will is to be proved.*
3. *When the Will is to be proved.*
4. *How and in what manner is a Will to be proved.*
5. *What are the Fees upon Probate of a Testament.*
6. *Touching refusal to prove the Will.*
7. *That a Probate suspended by Appeal, is no Probate.*
8. *Law Causes touching this Subject.*

1. **E**Very Last-Will and Testament after the Testator's death, ought to be duly proved before a competent Judge in the Ecclesiastical Jurisdiction. A Testament, or Last-Will, is to be proved before the Bishop of that Diocese within which the Testator had his Domicil, or Habitation, or before his Official; unless by Custom, or Prescription, within certain Lordships, or Mannors, it appertains to the Chief Lord; (a) or unless the Testator died within some peculiar Jurisdiction, in which Case the Probation of the Testament may by Prescription, or Composition, belong to the Judge of the Peculiar; (b) or unless the Testament be such as wherein only Lands, Tenements, and Hereditaments, and no Goods be devised; or unless the Testator had *Bona Notabilia* at his death in divers Diocesses; in which Case the Probation of the Testament appertains to that Arch-Bishop within whose Province such *Bona Notabilia* are: (c) Or unless by Custom it appertains to the Major of some Borough; for ordinarily, and regularly, though Wills and Testaments are to be proved before the Judge of that Jurisdiction within which the Testator died, or rather within which he had his usual Habitation, and made his last abode. (d) yet some Testaments may be proved in some Boroughs before the Major thereof by Custom; where it shall be understood to be only in respect of the Burgages within such places devisable; but in respect of their Goods they shall be proved according to the Law *Communi Forma*; (e) and there only where the Lands are bequeathed: Which is nothing strange, when, as aforesaid, in some Mannors by Prescription, Testaments may be proved before the Stewards thereof, yea, though no Lands be bequeathed therein. (f) And here note, That the Probate of a Will, which in it self is void, doth not make it good. (1 And Executors, upon the Ordinary's Process to prove the Will, not appearing, but stand-

ing

(a) Fitz. tit. Testament. nu. 2. & Dr. & Stu. l. 2. c. 28.

(b) Jo. de Artho. in Legat. in Liberrat. de Execut. Testa. verb. Ordinario.

(c) Lynw. in c. Statut. verb. ad quos pertinet. & Perk. tit. Testament. fol. 94. & Fitzh. Abridg. tit. Adm. n. 7. & Brook. cod. tit. 48.

(d) Dr. & Stu. ubi supra. & Perkins ubi supra. & Tract. de Rep.

Anglicana. l. 3. c. 7. & 21 H. 8. c. 5.

(e) Offic. Exec. c. 4. § 1.

(f) 2 R. 3. Fitz. 4. Coke lib. 9. fol. 43.

(1) Vid. Dyer 160.

ing in contempt, are excommunicable: (2) But if appearing, shall then make Oath, That the deceased had Goods, or good Debts, at the time of his decease, in some Diocess, or Diocesses, or peculiar Jurisdiction within that Province, other than in that wherein the said Party died, to the value of 5 *l.* and shall specify the same, he is immediately to be dismiss'd, and to prove the Will, or take Administration in the Prerogative Court of the Arch-Bishop of that Province, and to exhibit the same under Seal before the said Ordinary, within forty days next after. (3)

(2) 3 H. 7. 14.
9 Ed. 4. 47.
3 H. 7. 14.
Plow. Com. 281.

(3) Lib. Canon.
Ecclef. edit. an.
1603. Can. 92.

The Probate of Testaments did belong to Ordinaries, but of later times, *de Consuetudine Angliæ & non de Communi Jure*: And the Power to grant Administration was granted to the Ordinary, by the Statute of 31 Ed. 3. cap. 11. And before that time, the King was accustomed to seize the Goods of the Intestate, to the intent they might be bestowed for the Burial of the Dead, and the Payment of the Intestate's Debts, and the Advancement of his Wife and Children; and the Ordinary himself hath not power to sell the Goods of the Intestate, though they be in danger of perishing, nor release a debt due to the Intestate: By the Statute of 31 E. 3. the Commissary of the Bishop of the Diocess granted Letters, *Ad colligendam & ad vendendum ea quæ peritura essent, & inde computum reddere*; the Grantee sold Goods which would not keep, but perished; and an Action of Debt was brought against him as Executor in his own wrong, and it was adjudged maintainable, because the Ordinary himself had not such power; and therefore he could not give it to another, 7 Eliz. Dyer 256. Again, the Practice hath been, when Testaments have been proved before other than such as are mentioned in the Premises, as appears by this Case. A Testament is disproved in the Ecclesiastical Court, and the Party appeals to the Metropolitan, and it is there disproved, and afterwards there is an Appeal to the Court of Delegates, and it is there disproved also; and at last the Party appealed to the Queen in Chancery, by the Statute 25 H. 8. and there also it was disproved before the Commissioners: And if the Queen *ex Autoritate sua Regali*, might grant Letters of Administration, was the Question. The Opinion of the Justices of the Common Pleas, was, That she might, because the said Court of Chancery is the highest Court; and the Matter being once there, it cannot be determined in any inferior Court: And then the Party may shew in his Declaration generally the matter, and that Administration was granted to him by the Queen, *Ex sua Regali Autoritate*, under the Seal of the Court of Delegates, Mich. 24 Eliz. in C. B. See after, 10 *Jas. Godbolt* in B. R. *Stephenson's* contrary, That the Court of Delegates cannot grant Letters of Administration.

Co. 9. part 10.
Hensloe's Case.

Mich. 22 Eliz.
Dyer 367 *Hugh's*
Abridg. verb.
Wills and Testa-
ments.

A Lessee for Years of Lands, by his Last-VVill devised his Term to one whom he made his Executor, and died : The Devisee entered before any Probate of the VVill, and held the Land for a Year and more without any Probate, and then died. The Question was, VVhether his Executor or Administrator should have the Term, or that the Ordinary should commit Administration of the Goods of the first Testator ? It was the Opinion of the Court, That the Property of the Term was lawfully in the Executor by his Entry, and the Devise well executed without any Probate.

In Debt against Executors, it was resolved, That if any of the Executors refuse before the Ordinary, yet he that refused may Administer the Testator's Goods at his pleasure, and prove the VVill : But if all the Executors do refuse before the Ordinary, there Administration shall be granted, and they cannot after Administer. 2. That in Debt brought against an Executor, it is a good Plea, That the Testator made him and another Executor, who is alive not named, without saying that the Testament is proved. 3. Resolved, That the Lords of Mannors in former times had the Probate of VVills in their Courts ; and in ancient time when a Man died Intestate, and had made no disposition of his Goods, the trust of them was committed to the King, who was, and is, *Patens Patrie*. And the Ordinary was constituted by the King *in loco Parentis*, and his Power was given to him by the Statute of 31 E. 3. cap. 11. 4. Resolved, That altho' the Ordinary had the Power given to him as before, yet no Power thereby is given to the Ordinary to sell or dispose of the Goods, either to his own use, or to the use of any other ; and that he hath not any absolute Property in the Goods, but a Property only *Secundum quid*.

Vid. Cok. 9.
Part 37, 38. in
Henslo's Case. vid.
Hugh's Abridgment
verb. Probate of, &c.

(g) Perk. tit.
Test. fol. 93.

(h) 21 H. 8. c. 5.
& l. 1. ff. quem-
admodum testa.
approba. & ibi
Bart. Bald. & Ang.
in dist. l. 1.
(i) Glöf. & Bald.
in l. 2. ff. ibid. in
princip.
(k) L. 1. in prin.
& §. hoc interd.
ff. de Tab. exhib.
(l) Alex. in l. 2.
C. de Test. nu. 3.
verb. Tamen.

2. The Testament is to be proved by the Executor (g) whom the competent Judge either *ex Officio*, or at the instance of the Interested, may call before him to prove the same, and to declare his acceptance or refusal of the Execution thereof ; (b) yea, some think it may be done at the instance of such as have no Interest, to the intent that thereby they may be certified whether the Testator left them a Legacy. (i) And because it often happens, that a Last-VVill or Testament is left in the Custody of some other Friend than the Executor, the Law hath provided, that in whose Hands soever it remains, he is compellable to produce the same, and to exhibit such Testament. (k) And if he once had it, the Law presumes him to have it still, until he prove the contrary by good Evidence, or by his own Oath at least. (l) Also an Executor dying before he hath proved his Testator's VVill, his Executor (that is) the Executor's Executor may not prove both the VVills, and so become Executor to both the Testators ; but in case the Goods of the first Testator were, after Debts paid, bequeathed to the first Executor,

Executor, then may his Executor take Administration of the first Testator's Goods, with the Will annexed. But if otherwise an Executor's Executor doth intermeddle with the first Testator's Goods, he is suable by such first Testator's Creditors, as Executor in his own wrong. (4) Nor is such Executor's Executor to be joyned with the Co-Executor surviving, either in the execution of the Will, or in any Suits or Actions; (5) but may have his Action against him for the first Testator's Goods detained by him. (6) And in regard the power of one Co-Executor is upon his death determin'd, the other surviving, the Ordinary in that case may, if he died Intestate, commit two Administrations; the one of the former Testator's Goods, not before Administrated; the other of the Goods of the surviving Executor Intestate. (7)

(4) Bro. Abridg.
tit. Executor.
nu. 29. 99.
(5) Bro. ibid.
nu. 92. 160.
(6) Ibid. nu. 99.

(7) Ibid. nu. 149.

3. The time when the Will is to be proved is somewhat uncertain, and left to the Discretion of the Judge, according to the distance of the Place, the weight of the Will, the quality of the Executors, the absence of the Witnesses, the importunity of Creditors and Legataries, and other Circumstances incident hereunto.

(m) Yet regularly Testaments ought to be intimated to the Official or Commissary of the Bishop of the Diocess within four Months next after the Testator's death. (n) And the Ordinary may sequester the Goods of the Deceased, until the Executors have proved the Testament; so may the Metropolitan, if the Goods be in divers Diocesses. (o) Also the Ordinary may compel the Executor to prove the Will, and to accept or refuse the Administration: If the Executor refuse, or if there be a Will made, and no Executor appointed, the Ordinary must commit Administration *cum Testamento annexo*, to whom he shall think fit, and take Bond of the Administrator to perform the Will. If no Will be made, he must grant Administration to the next of Kin: If they refuse it, then to whom shall desire it; and if no Body take the Administration, the Ordinary may grant Letters *ad Colligendum bona Defuncti*, and thereby take the Deceased's Goods into his own hands, wherewith he is to pay the Debts and Legacies, so far as the Goods will reach; (p) for which himself becomes liable in Law like other Executors or Administrators. The time for the Probate is (as aforesaid) left to the discretion of the Judge, as the Circumstances shall induce; who may not proceed therein in case of doubt, Whether the Testator be dead or not. The Proof whereof, if it cannot be had by sufficient Witnesses, recourse must be had to the Presumption of Law (supposing the Party to be in some Remote or Transmarine Parts, or out of the World;) which Presumption takes its Measures better from the time of the Parties Nativity, and the wonted Habit of his Constitution, then, as some would have it (though not without ground from the Civil Law)

(m) L. 3. §. utrum.
ff. quemadmod.
Testam. approb.
(n) Fulb. Par. 3.
Dialog. 3. fol. 32.
(o) 9 Ed. 3. 3.

(p) 31. E. 2. c. 11.
& 13 E. 1. c. 19. &
21 H. 8. c. 5.

from

(8) Jaf. & Sichard
in L. 2. C. de
Testa. alter.
nu. 7. 8.

from the Testament it self, (8) which by prudent Persons is frequently made in Health and Youth, as well as in Sickneſs and Old Age, and iterated alſo by the ſame Perſon as occaſion requires : From whence therefore *Leviſſima Præſumptio* can ſcarce ariſe, unleſs circumſtantiated with other Adminicular Inducements : And therefore in the Caſe of a Perſon long abſent, and in parts far remote and Tranſmarine, *Fame*, common and conſtant *Fame*, under its due and legal Qualifications, which are many, may amount to a proof ſufficient to evidence his death, in order to a proceeding to prove his Teſtament, ſpecially if his Goods are for the moſt part *bona peritura*, the Executor therein named able and honeſt, and the Teſtament it ſelf in favour of his Children, or *ad Pios uſus*.

4. A Teſtament after the Teſtator's death, and not before, may be proved either in *Common Form* ; as when the Executor preſenting the Teſtament before the Judge, without citing the intereſſed, doth depoſe the ſame to be the true, whole, and Laſt-Will and Teſtament of the deceased, and whereupon the Judge doth annex his Probate and Seal thereunto : Or, *in form of Law*, as when the Widow or next of Kin to the deceased, are cited to be preſent, in whoſe preſence the Will is exhibited before the Judge, whereupon Witneſſes being produced, received, ſworn, examined, and their Depoſitions publiſhed, the Judge, in caſe of ſufficient proof, doth pronounce for the validity of the Teſtament. (q) Now he that proves but in *Common Form*, may be compelled to prove the ſame again in form of Law : But being once ſo proved, the Executor is not compellable to prove it any more ; (r) but being proved only in *Common Form*, it may be queſtioned at any time within thirty Years next after, (s) by common Opinion, before it work Preſcription, which is otherwiſe, in caſe it be proved in Form of Law, or *per Teſtes*. There is another kind or form of proving Teſtaments, which in the Civil Law is called *Apertura Teſtamenti*, but this favours too much of Ceremony to be of any uſe with us. Let it therefore ſuffice to be farther noted, That be the Teſtament proved in what manner ſoever, yet the Executor, before the Office-Seal be affixed thereto, is to be obliged by his Oath, yea, and by Bond, if need ſo require, to render a juſt Account of the Execution of the Teſtament, when he ſhall be thereunto lawfully called.

(q) Bal. in l. 1. c.
de Teſta. nu. 2.
& Sichard. ibid. &
Alex. & Paul. de
Caſt. & alii in
eand. leg.

(r) Paul de Caſt.
Conſil. 96. vol. 1.
& Simo de Prætiſ
de Interp. ult. l. 2.
dub. 2. Sol. 3.

(s) Cowel. Inter-
pret. verb. Probat.

(t) Stat. §. & poſt-
quam de Teſt. l. 3.
Provin. Conſt.
Cant.

(u) Coke Inſt.
part 4. verb.
Prærog. Court.
cap. 74.

(t) Laſtly, the Probate of every Biſhop's Teſtament, or the granting Adminiſtration of his Goods, altho' he had not Goods but within his own Jurisdiction, does belong to the Arch-Biſhop of the ſame Province. (u)

5. Touching the Fees for Probate of Teſtaments, for Regiſtring, Sealing, Writing, Priſing, making of Inventories, giving Acquittances, Fines, and all other things concerning the ſame ; as alſo
for

for granting Administrations, the Reader is here referred to the Statute of 21 H. 8. cap. 5. enacted in that behalf, where the Penalty is Ten Pounds for taking more than is there appointed. If the Executor request any to engross the Testament, he must agree with him that he doth so request, (w) or bring one ready ingrossed (w) Coke. Ibid. Stat. 21 H. 8. c. 5.

by the Statute, is advised as a safe and ready way. Note, that by the said Statute, neither the Money raised of Lands appointed by Will to be sold, nor the Profits thereof, are to be accounted as any of the Testator's Goods or Chattels. The Will is to be brought with Wax thereunto ready to be sealed, and Proof to be made thereof. And the Executor at the making of the Inventory is to call or take to him two of the Testator's Creditors or Legatees, or in their absence or refusal, two honest Persons of the Testators next of Kin, or for default of them two other indifferent Persons; which Inventory being indented, is to be attested for the Truth thereof by the Executor's Oath, and one part thereof to be left with the Ordinary; the other part thereof to remain with the Executor.

6. If on Process or Summons from the Judge, the Executors appear not to prove the Will, they are punishable for Contempt; if they appear, but refuse to prove the Will, the Judge may grant Administration to the Widow, or next of Kin. (x) Now Refusal cannot be by word only, but it must be Entred and Recorded in Court, and therefore it must be done before a competent Judge, and not before Neighbours in the Country. And in case the Ordinary himself be made an Executor, he may refuse before his Commissary, 9 Ed. 4. 33. But where an Executor hath once Administred, there he cannot afterwards refuse to prove the Will, and take on him the Executorship, because by once Administring, he hath accepted the Executorship by Interpretation of Law, and so determined his Election; and in that case the Ordinary ought not to accept of such refusal, but to compel him to prove the Will, and take upon him the Executorship. (y) Yet in case the Judge doth admit one to refuse, notwithstanding his former having Administred, it shall stand good. (z) But after refusal, and Administration committed to another, the Executor may not recede from it, and go back to prove the Will, and to assume the Executorship: Indeed if only upon the Executor's making default of appearance upon Process or Summons to prove the Will, Administration be *instant* committed to another, in this Case the Executor may yet any time after come in and prove the Will, and so undo the Administration. (a) But if after refusal, it appear to the Judge, that the Executor had Administred before such refusal, he may revoke the Administration, and enforce the Executor to proceed to the proving.

(x) Dist. Stat.
21 H. 8. c. 5. &
9 E. 4. c. 33. &
Plowd. 184. 2.

(y) 9 Ed. 4. 47.
Dyer in Case
Greisbook & Fox.
Plow. Com. 28 c. b.
Pasch. 7 Eliz.
(z) 26 H. 6. fol. 78.

(a) Mich. 27.
28 Eliz.

(b) Offic. Exec.
cap. 3. § 2.
*An Executor before
Probate of the Will,
may release, but not
bring an Action.*
Harrison's Case, Co.
5. part 28. vid.
Hugh's Abridg.
verb. Probate of
Wills and Testam.
(c) *Ibid. vide*
lib. 2. c.

proving of the Will : As if *A.* being Executor, shall Administer, and yet refuse to prove the Will, so that Administration is committed to *B.* : If *B.* being afterwards sued for Debt, shall plead the matter *supra*, it shall be found a good Plea. (b) Also an Executor may be sued for the Debts of the Testator in some Cases, even before the Will is proved ; for he may not by his own Act of delaying to accept or refuse the Probate of the Will, keep off Suits, except he will refuse in due manner, that so Administration being granted, there may be some one suable by the Testator's Creditors for the Debts owing by him. (c) But if only upon an Executors making default upon Process to prove the Will, Administration be presently committed to another : In such case, the Executor may at any time after prove the Will, and revoke the Administration. *Mich. 27, 28 Eliz. Bale and Baxter's Case.*

7. In an Action of Debt brought by an Executor, the VWill proved by Sentence was shewn in Court : The Defendant pleaded, That the pretended Testator died Intestate, and that Administration was committed to him, and shewed an Appeal from the said Sentence of the Probate of the Will. *Coke*, in the first place, it seems, the Plaintiff cannot have the said Action without a Probate of the Will, and that Appeal doth here suspend the said Probate, and so upon the matter, it is not any Probate at all, and therefore the Plaintiff cannot have Action, *Dod Concessit*, That the Appeal suspends the Probate, but 20 *H. 7.* an Appeal doth not suspend an Excommunication, &c. *Haught.* The Probate is but a matter of Form, and possibly therefore an Appeal will not suspend it, and it seems to me, that that Plea will not abate the Writ ; for if that should be a good Plea, no Executor shall have an Action during such Appeal, which would be a great prejudice. *Coke*, it ought notwithstanding to be so, if the Law be so. (23)

(13) *Trin. 13 Jac.*
B. R. Rol. Rep.
Case 33.

8. By the Common Law, one may be Executor *Quoad Administrationem*, and yet not be an absolute Executor, because the Will is not proved : For where an Executor dies before Probate, the Testator *nomine* dies Intestate *eventu*. (1)

(1) *Cro. 2. 614.*

One bequeathed all his Goods to his VVife his Executrix, after Debts and Legacies paid ; she dieth before Probate : In this Case, the Goods shall go to the Administrator of the Husband of the Goods not Administred. (2)

(2) *Hetley 105.*

Two Persons contending for an Executorship, both controverting in Law, which of them is the true and lawful Executor. Resolved, That the Ordinary may not in this Case (*pendente lite*) commit the Administration. (3)

(3) *More, Case 827.*

VWhen a VWill is once proved, albeit it be only by some, and not by all the Executors therein named, and those not Provers thereof, Refusers

Refusers also ; yet those Refusers, in Contruction of Law, continue Executors still ; at least so far, as that not only may such refusing Executor at any time afterwards, during the life of his Co-executors that proved the Will, Administer to the Testators Goods, but also must joyn and be joyned in Suits by or against the other Executors ; yea, notwithstanding such his refusal, Debts owing to or by the Testator may be paid or released by or to the refusing Executor. (4) Yet as to the joyning or be joyn'd in Suits, it is to be understood with this difference ; as, Whether the Executors are Plaintiffs or Defendants ? For if Plaintiffs, they being all privy to the Will, they must all joyn in the Suit : It may be otherwise if Defendants, in regard others should not be obliged to take notice of more than prove the Will, or Administer.

(4) Co. l. 5. fo. 23.
Cont. 18. E. 2.
Bre. 837.
22 Ed. 3. 19.
15 Ed. 3. Exe. 8.
41 Ed. 3. fol. 22.
21 Ed. 4. fo. 24.

C H A P. XXI.

Of proof requisite to a Will.

1. *What Testimony sufficient to prove a Will.*
2. *Proof requisite to a Will written by the Testators own hand.*
3. *What Witnesses are incompetent to prove a Will.*
4. *Legataries, how far they may be competent Witnesses.*
5. *Animus Testandi, how it may be proved.*

1. **V**Here there is no controversy or dispute touching the Will, there the single Oath of the Executor alone is sufficient for the Probate thereof in *Common Form* ; and where other proof is requisite, there it lies much in the breast of the Judge duly regulated by Law, what proof to admit for the number of Witnesses, for the quality of them, and for the nature of the proof, according to the circumstances and strength of opposition made against the Will. But regularly by the Laws and Customs of *England*, two Witnesses, without exception, are requisite for the due proof of a Testament, and two such are sufficient : (a) So that it is not necessary to have any more than two, (b) and it may be in vain to have no more but one ; (c) for a Nuncupative Testament must be proved by at least two Witnesses without exception. And as to the number of seven Witnesses required by the Civil Law to the proof of a Testament, it is merely a Solemnity, and nothing at all of the Substance of the Testament ; for that number is also variable even by that Law, whereby we find two Witnesses sufficient for the proof of a Military-Testament. (24) Which number, as it doth suffice *jure Divino* ; so also by the Law

(a) Jus Civile exigit septem. §. sed cum. & §. fin. Inst. de Testam. Ordin.
(b) In c. Statut. verb. probatis. l. 3. Provin. Const.
(c) Jass. in l. Cunctos. C. de Summa Trinit.
(24) L. 1. & l. Divus de Milit. Testam.

(25) C. cum esset, & c. relatum de Testam.

(26) L. fin. c. de Codicil.

(27) L. hac constitutissima. c. qui Testa. fac. poss.

(28) L. fin. c. de Fidei commiss.

(29) L. omnium Testam. Cod. de Testament.

(30) L. si non speciali. Cod. eod. t. t. & in l. si quando. c. de inolic. Testam. Case *Chadron* against *Harris*. Noy.

Pet. B. R. 300.

of Nations, and by the Canon Law. (25) Sometimes we find five Witnesses will suffice by the *Civil Law*: (26) And in some Cases that Law requires no less than eight Witnesses to prove a Testament. (27) And yet in some Cases one Witness, together with the Executors Oath is sufficient. (28) Yea, by that Law it may be well proved without any Witness at all, if the Testament were made in the presence of the Prince or Supreme Magistrate, (29) The Reason is, because such Witnesses (specially as to the number thereof) being but a Solemnity of Law, the Prince may remit it; (30) as also because of the Dignity of such person in whose presence the Testament is made. But regularly a single Witness, without other Adminicular proof, is not sufficient to prove a Will, as in the Case of *Chadron* against *Harris*; where it is said, If the Ecclesiastical Court proceed in a matter that is meer spiritual and pertinent to their Court, according to the Civil Law, although their proceedings are against the Rules of the Common Law, yet a *Prohibition* does not lie. As if they refuse a single Witness to prove a Will, for the Conufance of that belongs to them. And agreed also, That if a man makes a Will, but appoints no Executor, that that is no Will, but void. But if the *Ordinary* commits Administration with that annexed, the Legatary to whom any Legacies are devised by such VWill, may sue the Administrator for their Legacies in the Spiritual Court. Note, P. 4. *Ja. B. R. Peep's Case*, a *Prohibition* was denied; where they in the Spiritual Court refused a single Witness in proof of payment of a Legacy.

2. A Testament written by the Testators own hand, proves it self, without the help of such Witnesses; yea, though it hath not his name subscribed to it, nor his Seal affixed to it, nor Witnesses present to it; provided it be undoubtedly known to be his writing, or can be sufficiently proved so to be; yet it shall have the more Authority, if so be it be subscribed by himself and Witnesses, and Sealed. Nor is it necessary to the proof of a written Will, that the Witnesses hear it read, or subscribe it, so as they can depose that the Testator declared before them, that the self-same Writing now produced, is, was, or should be his Last-Will and Testament. For in a written Will or Testament it is not necessary that there be any Testimony of Witnesses, where it is certain and undoubted that the Testament is written or subscribed with the Testators own hand; (d) or that the Testator caused the same to be written by another: But if these be doubtful, then the Testimony of VWitnesses is necessary. (e) Also the VWitnesses ought to prove the very Identity of the VWriting, that is, that the VWriting now shewed, is the very same VWriting which the Testator in his life time affirmed before them to be his Last-VWill, or to contain his VWill, or other words full to this purpose: (f) So that it is not sufficient

(d) Auth. quod. sine. C. de Test.

(e) Bart. in l. si ira Script. ff. de Cond. & Demon.

(f) D D. in l. hac Constitutiss. & in Auth. in non observato. C. de Testam.

sufficient for the Witnesses to say, This is the Testators own hand, for or because we know his Hand; (g) neither is it sufficient by comparing other Writings of the Testators own hand with the Testament; (h) for hands may be counterfeited, therefore proof by similitude of hands is not full proof, (i) except where the style and practice of the Court runs otherwise. (k) Nevertheless, if the Witnesses depose that they saw the Testator write or subscribe the Testament, and know the same to be his Testament and Hand; (l) or that they had heard the Testator to confess that he had made his Testament, and that the same was in such a mans Custody; (m) or if the Testament were found in the Testators Chest among other his Writings: In these Cases the proof made by comparing of Hands, is a full and sufficient proof, (n) yea, though there appear not any of those helps by probable circumstances, yet if there be no suspicion of fraud, nor fear of subornation, proof made by comparing of Hands may be allowed for full and sufficient proof. Likewise if it be proved, that the Testator in his life-time did acknowledge that his Testament was contained in a Writing left in such a mans hands or custody, and that man produce a Writing, deposing it to be the same which the Testator left in his custody; such proof is sufficient without any further comparing of Hands. (o) But if the Testator did also acknowledge that his Testament contained in such a Writing left in the custody of such a person, was written with his own hand, then such proof is not sufficient, without comparing of hands, whereby it may appear to have been written by the Testator himself. (p) And it is held, in case of a Devise of Land, That the shewing of the Will under Seal of the Court where it was proved, and proof that it was examined by, and agreeth with the Original, is good Evidence, without shewing of the Original Will. (30)

3. Regularly all persons are held competent Witnesses to prove a Controverted Will, save such as the Law holds incompetent; such are such as are parties interested, or presumed in Law to be byassed in affection, or the like; also infamous Persons, as perjured, or the like; also such as for want of judgment and understanding the Law rejects. And if it cannot be proved whether it be a Testament or a Codicil, the circumstances being so indifferent to either, then is it most safe, in regard of the Statute, to commit the Administration to the Widow or next of Kin demanding the same, to avoid the forfeiture of Ten pounds, (q) in case the Judge before whom such penalty is demandable, should adjudge the party to have died Intestate, or without a Will.

4. A Legatary may be a competent witness for the proof of a Will in all parts thereof, saving for what concerns the Legacy therein bequeathed to himself. (r) So that suppose never so many

(g) Bart. & alii in l. si ita scripsero. ff. de Cond. & Demon.

(h) Sichard. in ff. Auth. Quod sine.

(i) Bart. & alii in l. Admonendi. ff. de jure-jurand.

(k) Vestr. Prac.

l. 6. c. 1.

(l) Sichard. ubi supra.

(m) Bart. & alii in l. si ita scripsero. ff. de Cond. & Demon.

(n) Graf. Thef. Com. Op. §. Test. q. 16.

(o) Alex. Conf. 167. vol. 5. nu. 1.

(p) Astruc in l. hæredes palam. ff. de Testa. nu. 2.

(30) Clayt. Rep. 98.

(q) Stat. 28. H. 8. c. 5.

(r) §. Legatariis. Inst. de Testa. Ordin. & Portius Ibidem.

(f) Bart. in l. omnibus C. de Testib.

(t) Albert. de Testib. c. 4. nu. 57.

(u) Gloss. in l. plane. Inst. de Testa. Milit.

(w) Mant. de Conject. ult. vol. l. 2. tit. 15. & l. ex feud. ff. de hered. instit.

(x) Gloss. in l. Divus. ff. de Milit. Testam.

(y) Gloss. in dict. l. plane.

(z) Gloss. in dict. l. Divus.

(31) L. in his ff. de solut. & l. Publica. ff. de Deposit.

(32) L. non aliter. ff. de Leg. 3.

(33) S. quod vero, de Jur. Nat. Gent. & Civil.

(34) L. cum avus, ff. de Condit. & Demon. & l. fin. C. de fam. Heredit.

Witnesses to a Will, wherein each of them hath a Legacy, they cannot sufficiently prove the Will as to their own Legacies, (f) but for the rest of the Will they may. (t)

5. It is very observable, that the most considerable Requisite the Law aims at to the constituting of an Executor, and making of a Testament, is to be proved more by Circumstances than by VVitnesses; and that is *Animus Testandi*, or the intent or purpose of the Testator to make his VWill. (u) For it is the mind, purpose and intent of the Testator, more than his words, that giveth life and being to the Testament. (w) The Circumstances that prove the intent or purpose, must also themselves be proved by VVitnesses. These Circumstances proving such a purpose in the Testator, are many; as, when the Testator is in any more than ordinary danger of death; (x) or that he orderly composeth himself for such a work; (y) or that he required the VVitnesses to bear witness thereof; (z) with many other the like Circumstances, as to the person, time, place, occasion, manner of speech, deportment, and in whose presence; All which the circumspect Judge is to take into consideration; for since the mind and intention of the Testator is the essential Qualification of every Testament, and not capable of a Being otherwise than by such intention, and the mind and intention of man not so much as conjecturable, otherwise than by outward Circumstances, it is most necessary that they fall under a due proof by sufficient VVitnesses. And in such things as depend meerly on the Testators Will, a more exact Inspection is to be had to what he meant and intended, than to the terms by which he expressed himself. (31) Yet may we not depart from his words, without a very plain Evidence of his mind discrepant from the same. (32) And where the mind and Intention of the Testator is doubtful, in that case it ought to be interpreted, rather according to the Law of Nature, and the *Jus Gentium*, than any private or municipal Law whatsoever: The reason is, because the Law of Nature being inherent in him, it is to be presumed, his Will and Intention was rather governed by that, than by any other Law whatever. (33) And therefore where the Testators mind or meaning is doubtful, if the Testament be in favour of his Children, it is sufficient for the upholding thereof, if you can but any way guess at his meaning, or may have any probable Conjectures for the same. (34)

C H A P. XXII.

Bona Notabilia.

1. *What shall be accounted as Bona Notabilia.*
2. *Where the Will is to be proved, in case there be Bona Notabilia.*
3. *How or when Debts and Bonds may make Bona Notabilia.*
4. *Law-cases touching this subject.*

1. **I**T is agreed by all, that Five Pounds is the sum or value of *Bona Notabilia*; provided, that where by Composition or Custom in any County *Bona Notabilia* are rated at a greater sum, the same is to continue unaltered; as in the Diocess of *London* it is Ten Pounds by Composition, (a) provided also, that if any man die *in itinere*, or in a journey, the Goods that he hath then about him, or with him, shall not be as *Bona Notabilia*, to cause Administration to be committed, or the Will to be proved in the Prerogative. (b) Nor is it necessary that the party must have Five pounds in each and every of the several Counties where his Goods are dispersed; but it is sufficient if the party deceased were possessed of Goods and Chattels in some other County than that wherein he lived and died, to the full value of Five Pounds, besides those Goods extant in the County where he died. So that although the deceased's Goods and Chattels do amount to Ten pounds or more; yet if the Goods and Chattels extant in some other County, do not extend to Five pounds at the least, the deceased is not to be accounted to have *Bona Notabilia*.

Canon. 92, 93.
1 Char. 1.

(a) Coke part.
4. Instit. cap. 74.
verb. Prerogat.
Court.

(b) Offic. Exec.
c. 4. §. 2.

2. Regularly the Will is, as hath been said, to be proved in the Ecclesiastical Court of the same County where the Testator is an Inhabitant, or wherein he made his most usual residence and abode for the later years before his Death, and not in the Ecclesiastical Court of that County wherein he made his Will, or wherein he died, but where his last place of habitation was; but if the Testator died possessed of Goods to the value of Five pounds, called *Bona Notabilia*, in divers Counties, then the Will is to be proved in the Prerogative Court, to which also Appeals from any other inferior Jurisdiction: So that the Prerogative Court of the Archbishop of *Canterbury* is the Court wherein all Testaments are to be proved, and all Administrations to be granted, where the party dying within his Province hath *Bona Notabilia* in some other Diocess than that wherein he died, which regularly is to be to the value of Five pounds, save where by Custom or Composition it is

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at any greater sum, as aforesaid. Also if any Testator die not possessed as aforesaid, and the Executor notwithstanding prove the Will in the Prerogative, such Probate shall stand good; But it is otherwise if the Will be proved in the inferiour Jurisdiction when the Testator dies possessed, as aforesaid, of *Bona Notabilia*; for in such case it is again to be proved in the Prerogative. And if a man hath Goods in divers Diocesses or Provinces, and make his Executor of his Goods in one of the Provinces, and die Intestate as to his other Goods: And if the Ordinary do commit Administration of the Goods which are in the other Province unto the said Executor, then is he both Executor and Administrator, and the party died both Testate and Intestate. (c) And if a man died Intestate having *Bona Notabilia* in divers Diocesses, the Judge used to assess a convenient sum to be employed in *Pios usus*, but with and under certain Limitations, (d) or legal Restrictions.

(c) 35 H. 6. 36.

(d) Coke ubi supra.

3. Debts owing to the Testator, are held *Bona Notabilia* as well as Goods in possession, their value being answerable; yet if the penal sum of a Bond be but Five pounds for the payment of a less sum, although the Bond be forfeited, yet that is not understood as *Bona Notabilia*, although in Law the whole penal sum be a Duty. (e) And those Debts are said to be *Bona Notabilia*, where the Bonds or other Specialties are, and not where the Debtors inhabit; so that if the Bonds be in the County where the Testator died, and the Debtors in another County, in this Case the Will is not to be proved in the Prerogative Court; but in case the Debts are only by Contract without Specialty, they are then to be esteemed *Bona Notabilia* there, and in that place where the Debtor is. But in case Lands be by Will given to be sold for payment of Debts and Legacies, this is not to be accounted as *Bona Notabilia*, though it be Assets; (f) for where Land is bequeathed to be sold for such uses, there neither the Money raised thereby, nor the profits thereof shall be accounted as any of the Testators Goods or Chattels.

(e) Offic. Exec. ubi supra.

Hill. 37 Eliz.
M. Comu. Da. vid.
13 & 14 Eliz.
Dyer. 305.

(f) Ibid.

4. One had Goods solely in an inferiour Diocefs, and the Metropolitan of the Province pretending that he had *Bona Notabilia* in divers Diocesses, committed the Administration of the Goods. It was resolved, That such Administration granted by the Metropolitan, was not void, but voidable by Sentence, because the Metropolitan hath Jurisdiction of all places within his Province. But if the Ordinary of one Diocefs committeth Administration of Goods, when the party hath *Bona Notabilia* in divers Diocesses, the Administration is void as well for his Goods within the Diocefs, as without. (g)

(g) 22 Eliz. in
C. B. *Vire and*
Jefferies Case.
Co. 5. part. 29.

In an Action of Debt brought by an Administratrix upon an Administration brought by the Bishop of R. the Defendant plead-

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ed an Administration committed to him by the Dean and Chapter of *Canterbury Sede Vacante*, because the Intestate had *Bona Notabilia*. The Plaintiff replied, that the said Administration was repealed; and it was adjudged for the Plaintiff: 1. Because the Defendant did not shew what *Bona Notabilia* the Intestate had in certain; and it shall be intended he had not *Bona Notabilia*, and such Administration is but voidable. 2. Because before the Repeal of the Administration committed by the Metropolitan, the inferior Ordinary may commit Administration; and when the Defendants Administration is repealed, it is void *ab initio*; and in the principal Case it also was resolved, That whereas the Administration was committed to the Obligor, that the Debt was not extinct, because it is in another right: otherwise it is, if the Obligee himself made the Obligor his Executor. (b)

(h) 8 Jac. Co.
8. part. Sir John
Needhams Case.
fol. 135.

In Debt brought upon an Obligation, the Case was, the Intestate died in *Lancashire*: The Obligation upon which the Action was brought was in *London*, at the time of his death. The Bishop of *Chester*, in whose Diocese the Intestate died, grants Administration to *J. S.* who released to the Defendant: The Archbishop of *Canterbury* granted Letters of Administration to the Plaintiff, and in Debt brought by him, the Release was pleaded in Bar. In this Case, it was holden by the Justices, where one dieth who hath Goods in divers Diocesses, *Canterbury* shall have the Prerogative: And it was holden, That if *Canterbury* hath not any Prerogative in *York*, yet that this Bond ought to be sued in, and committed Administration of, within the Court of *Canterbury*, and committed by the Bishop of that Diocese. (i)

(i) Hill. 38. Eliz.
C. B. *Byron and
Byrons Case* Cro.
3 part. 472. and
Hugh's Abridgm.
vol. 3. tit. Admini-
istrator.

If a man dies Intestate, having Goods in divers Counties, the Metropolitan shall grant the Administration, 14 *H. 6.* 21. 10. *H.* 7. 18. 35 *H. 6.* 43. If he hath *Bona Notabilia* to the value of One hundred shillings in divers Diocesses, the Metropolitan shall grant the Administration, 10 *H. 7.* 16. b. Or if a man dies beyond the Seas Intestate, the Archbishop shall grant the Administration; *P. 11. Jac. B. per. Co.* to be adjudged in 42 *Eliz.*

Rolls Abridgm.
tit. Execut. lit. F.

If a man dies Intestate, having *Bona Notabilia* in *England* and *Ireland*, several Administrations shall be granted; viz. by the Archbishop of *Canterbury* for the Goods in his Province, and by the Archbishop of *Dublin* for the Goods in his.

Dyer. 14 *Eliz.*
305. *Roll. ibid. G.*

It is ordained by a Canon, 1 *Jac. cap.* 92. That if a man dies in a Journey, the Goods which he had at that time with him, shall not cause his Testament or Administration to be liable to the Prerogative Court.

If a man hath Goods to the value of Five Pound in one Diocese, and a Lease for years of the same value in another Diocese, they are *Bona Notabilia*, whereby the Archbishop shall grant the Administration;

Rolls Abridgm.
tit. Execut. lit. H.

Trin. 14 Car.
inter *Lunn* and
Dodson, per Cur.
riam. Roll. ibid.
lit. G.

Hil. 37 Eliz. B.
& Trin 17 Jac.
inter *Trombridge*
and *Taylor*, per
Cur. Roll. ibid.

Dyer. 14 Eliz.
305. 58.

Perkins. §. 489.
Roll. ibid. lit. I.

nistration, although the Lease for years be not a thing moveable, nor properly *Bonum*, but it is a Chattel according to Pleadings.

If a man becomes bound in an Obligation at *London*, and dies Intestate in *Devon*, and there hath the Obligation at the time of his death with him, Administration ought to be granted by the Bishop of *Exon*, where the Obligation was at the time of his death, and not by the Bishop of *London* where the Obligation was made; for the Debt shall be accounted Goods, as to the granting of Letters of Administration, where the Bond was at his Death, and not where it was made.

To make *Bona Notabilia* a Debt without Specialty, shall be accounted Goods where the Debtor lives, and not where the Testator lived. Likewise if a man dies Intestate, having divers Debts or Obligations in several Diocesses, the Debts are said to be *Bona Notabilia*, where the Bonds or Obligations are, and not where the Debtors or Debtors are.

If a man hath Goods to the value of Five pound in one Diocefs, and a Bond or Obligation to a greater value in another Diocefs, the Obligation being there also made, they are *Bona Notabilia*, for which reason the Arch-bishop shall grant Administration.

Anciently if a man died Intestate, having Goods to the value of Forty shillings in two Diocesses, it should make the Goods to be *Bona Notabilia*, whereby Administration should be granted by the Archbishop. But by a Canon, 1 *Jac. cap. 93.* it is ordained, that *Bona Notabilia*, shall be accounted to be Five Pound at least, and that none shall be said to have *Bona Notabilia*, unless he hath Goods in divers Diocesses, to the value of Five pound, and so that Canon hath changed the Law, if it were otherwise before. Likewise in the said Canon there is an Exception of such Diocesses where by Custom or Compulsion *Bona Notabilia* are rated at a greater sum than Five pound.

THE

Chapters of the second Part.

- Chap. I. **O**f the appointing or constituting Executors.
 Chap. II. Of Conditional Executors.
 Chap. III. Of Co-executors.
 Chap. IV. Of substituted Executors.
 Chap. V. Of the several ways of constituting Executors.
 Chap. VI. Of Incapacity to an Executorship.
 Chap. VII. Of an Executors Executor.
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- Chap. XXVI. *Of a Devastavit or Wast in an Executor or Administrator.*
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T H E

T H E
Orphan's Legacy.

P A R T II.
Of Executors and Administrators.

C H A P. I.

Of the appointing or constituting Executors.

1. *The Testators freedom or liberty in making Executors.*
2. *How the Office of Executorship may be perform'd or discharg'd, when a King is made Executor.*

1. **T**HE word *Executor* taken in the largest sense, falls under a threefold Acceptation; for so there is *Executor a Lege Constitutus*, and that is the Ordinary of the Diocess; and there is *Executor a Testatore Constitutus*, and that is the *Executor Testamentarius*; and there is *Executor ab Episcopo Constitutus*, and that is the *Executor Dativus*, who is called an Administrator to an Intestate: By the Civil-Law, this *Executor Testamentarius*, or *Hæres* in the Dialect of that Law, doth succeed in *Universum jus defuncti*. (a) Now the Law holds forth that liberty to Testators, that they may, if they please, exclude their own Wives and Children, and appoint strangers in their Testaments to be their Executors; (b) for the validity of the Testators Will chiefly consists in the freedom and liberty of the Will of the Testator. Therefore the Testator may, if he please, appoint even Bondment, Villains or Prisoners as his Executors, (c) or Infants, (d) yea, whether born, or not born at the time of the Testators death; (e) or Women, whether under Covert and Married, or Sole. (f) Also Testators may, if they please, make such persons their Executors, as are either their Debtors or their Creditors (g) or one single person, or many jointly as Co-executors in several persons, (h) or many joyntly representing

(a) L. 1. Cod. de Hæredib.
(b) Braët. de Consuetud. & Leg. Angl. l. 2. cap. 26. & Tract. de Reb. Angl. 3. c. 7.
(c) Inst. de Hæred. Inst.
(d) Brook. Abridg. tit. Execut. nu. 115.
(e) Jo. de Can. Tract. de Exec. ult. vol. partic. 1. nu. 44.
(f) Fitzb. & Brook. tit. Exec.
(g) L. Simus, §. in computatione. C. de jure delib.
(h) §. unum. Inst. de Hæred.

- (i) L. haered. C. de haered. Inst. & Minfing. in dict. §. unum. & Graf. Thef. Com. Op. §. Inst. q. 40. one Body, as a College, City or other Corporation. (i) So likewise they may make their Executors fimplly and abfolutely, or conditionally; alfo from a certain time, or to a certain time; alfo either univerfally, or fpecially and particularly; likewise in the firft, fecond, third, &c. degree, by the Subftitution of one Executor in the place of another. And here note, that after how many ways an Executor may be appointed, after fo many and the fame ways may a Legacy be given; and whofoever is capable of an Executorfhip, is alfo capable of a Legacy. (k) *Et e Contra*. This constituting or appointing an Executor, is fo effential to a Will, that it cannot have a Being, as fuch without it: Whence it hath alfo its Formation as well as its Creation; for as the Appointment of the Executor is in *Scriptis* or not, fo is the Testament a *Nuncupative*, or not: Infomuch, that be the Will never fo voluminous for Matter, or exact for Form, and all in very legible Characters, excepting only the Appointment of the Executor, which the Teftator makes only *Ore-tenus*, it amounts to no more than a Nuncupative Will, as to Goods and Chattels, though as to the Difpofition of Lands it may be a fufficient Will in *writing*, without the Appointment of any Executor at all; yea, albeit the Teftator having *written* all of his Will (except the Appointment of his Executor) fhould after only by word of mouth declare, That he whose Name is written down in the Note he left with *A. B.* fhould be his Executor, this will amount but to a Nuncupative Will. (r)
2. When the King is made Executor, he doth appoint certain perfons to Officiate the Execution of the Will; againft whom fuch as have caufe of Action may bring their Suits, and appointeth others to take the account. (l) So *Katherine Queen Dowager of England*, Mother of *Henry VI.* who died *June 2d, 1436.* made her Will, and thereof *Henry VI.* her fole Executor: Whereupon the King appointed *Robert Rolleston*, Keeper of the Wardrobe, and others, to execute the faid Will, by the oversight of the Cardinal, the Duke of *Gloucester*, and the Bifhop of *Lincoln*, or any two of them, unto whom they were to account. (m)
- (i) Sum. Silv. Tit. de Testam. fol. 443. lit. b.
- (j) Rot. Par. 15 H. 6. n. 32.
- (m) Coke Inst. part. 4. verb. Prærogat.

C H A P. II.

Of Conditional Executors.

1. *Executors may be appointed simply, or conditionally.*
2. *Executors may be limited in point of time.*
3. *A threefold Qualification of an Executors power.*
4. *A Case in Law touching Constructions of Wills, in reference to a Conditional Executor.*

1. **T**Estaments wherein the Executor is pure and simply made, are such as wherein the Testator maketh his Executor without any Condition at all: But when the Assignment or Nomination of the Executor hath some such quality added to it or joyned with it, as whereby the effect of the Disposition is suspended, and depends upon some future event, then is such Assignment said to be Conditional. (a) Also the Condition in creating or appointing an Executor, may be either Precedent or Subsequent; (b) yea and sometimes it may be Conditionally, that he give Security to pay the Legacies, and, in general, to perform the Will, before he act as Executor. The Conditions incident to the appointing of Executors are very numerous and uncertain, according to the pleasure of the Testator, so as they be neither unnecessary, nor impossible, nor unlawful, nor Captious Conditions. Notwithstanding, where an Executor is made, or Administration granted upon Condition, which is after broken, so that the Executorship or Administration is determined; yet in this Case, all Acts done by such an Executor or Administrator in pursuance of his Office, before such Condition broken, are good. (2) And if one do but appoint, That his Debts and Legacies being paid, his VVife putting in Security for the performance of his VVill, shall have the Relidue of his Goods; it hath been held, That by this she is a Conditional Executrix. (3)

2. The time may be limited when the Executorship shall begin, and that either certainly, or with reference to Contingency; (c) for by the Laws of the Land it is lawful for a Testator to appoint his Executor, either from a certain time, or until a certain time; and in the mean time Administration may be committed to the next of Kin, or to the VVidow; and the Acts then done by such Administrator cannot be voided by the Executor afterwards: (d) And in this sense, the same person may be said to die partly Testate, and partly Intestate, which by the strictness of the Civil Law is not allowable. (e)

3. As the Conditions incident to the making of Executors and giving of Legacies, are (as aforesaid) very many, and full of variety: So also the power it self of Executors may be limited, qualified, and divided; especially these three ways, *viz.* First, *Really*, as thus, he may make *A.* his Executor for his Plate and Household-stuff; *B.* his Executor for his Sheep, and Cattel; *C.* his Executor for his Leases and States by extent; and *D.* his Executor for the Debts due to him. Secondly, *Locally*, as thus, *viz.* he may make *E.* his Executor, for his Goods in *Cornwall*; *F.* his Executor, for his Goods in *Devon*; and *G.* his Executor, for his Goods in *Somerſet*. Thirdly, *Temporally*; as thus, he may make his Wife his Executrix during her Widow-hood, or during his Sons Minority. (*f*)

(C) 19 H. 8. 3. &
16 H. 8. Dyer.
4 Hill. 33 Eliz.
in Com. B. &
32 H. 8. Broo.
125.

4. Somewhat to this purpose there was a Case where a Testator appointed his Wife his Executrix, if she suffer'd *A. B.* to enjoy such a certain parcel of Lands (probably part of her Joynture) for three years; otherwise *C. D.* should be Executor: The Question was, Whether she were Executrix presently upon the Testators death, or not till she had suffered *A. B.* to enjoy the Lands the three years: It was held by all the Judges (one only excepted) That she was presently Executrix, until she should disturb *A. B.* &c. For if so, it was then agreed, That the Executorship would by virtue of the Condition, pass from the Wife to *C. D.* (4) If the Wife might thus enter upon the Executrixship presently, *Q.* Whether she ought not first to give Security for performance of the Condition? Otherwise she may in less than one of these three years, dispose of all the Testators Goods and Chattels, and leave the said *C. D.* not only nothing but a dry and naked Executorship, but leave him without remedy also.

(4) Pasch. 33. Eliz.
C. B. *Alice Francis*
her Case.

If one be named in a VVill Executor, and another a Coadjutor, without more words, that Coadjutor is not by this a Co-executor; nor hath he, as such, any power to Administer or intermeddle with the Testators Estate, otherwise than as an Overseer, to advise, counsel and perswade; and (if need be) to rectifie miscarriages in the Executor, as one Concredited with a Trust for that purpose by the Testator. (5)

(5) 21 H. 6. 6. 7.
34 Ed. 3. tit.
Exec. 121. 29.
Ed. 3. 39.

If one appoint my Executor to be his Executor, and die, if the Will be not void for Uncertainty, yet he is dead Intestate until I die, and die Testate: But if I die Intestate, then he is dead Intestate also.

C H A P. III.

Of Co-executors.

1. *How one alone, or many jointly, may be made Executors.*
2. *How Executors may be made universally or particularly.*
3. *A Case in Law to this subject.*

1. **O**NE person alone, or divers together, so the number be not too numerous, may be appointed Executors. (a) And where divers persons be made Executors, all are to be admitted, and not one without the rest, (b) unless they cannot, or will not undertake the Executorship. (c) Which conclusion holds true, though he be a stranger who is joyned in the Executorship with the Testators own Son: It is true also, whether the Executorship be appointed alternatively or disjunctively; in which case, if the Testator say, I make *A. B.* or *C. D.* my Executors, both persons are Admissable; (d) For this word [*Or*] in favour of Testaments, is taken for [*And,*] (e) unless it be most evident that the Testator did bear much more affection to the one than to the other, (f) or unless the Authority of Election of the person be by the Testator granted unto another, (g) or unless one of the persons be incapable of the Executorship. (h) And here note, that where there be divers Executors, the Action commenced by them, or against them, ought to be commenced in all their names, and not in the name of some of them only without the rest. Or if a Testator in the former part of his Will, appoint two persons his Executors jointly and equally; yet if afterwards in his Will he make a *Proviso*, That the one of them (by name) shall not intermeddle during the life of the other, they shall then be Executors successively, not jointly. (i) But if the Subsequent *Proviso* be directly contrary to the premises, it will be void: And the last *Proviso* may not (as by some hath been opinionated) so controul the premises whereto it is contrary, as to stand for the Testators Will; because to enucleate his intention, which is the Index of the VWill, there ought to be a Comprehension of all contained in the VWill.

2. Likewise an Executor may be appointed either universally, or particularly. *Universally*, when he is made Executor of the whole VWill, or of all the Testators Goods, or indefinitely; (j) and such Executor may enter into all the Testators Goods: (k) In which respect he is universally chargeable with the payment of all his Debts and Legacies, so far as the same Goods extend. (l) Also an Executor may be appointed *Particularly*, that is, of some

(a) §. Et unum. Instit. de hered. Instit.

(b) L. religiosa. §. Sancti. de Test. lib. 6.

(c) Supra. part. 1. c. 20. §. 6.

(d) L. quidam. C. de verb. sign. & Mant. de Con.

ult. vol. 1. 4. t. 3. n. 19.

(e) Dist. 1. quid. C. ibid.

(f) Ripa. in C. inter ceteros. De Rescript. Extr. nu. 45.

(g) L. si Titio aut Scio ff. de Leg.

(h) Jaf. in l. cum quid C. de ver.

fig. limit. 5. & Brook. Abridgm.

tit. Execut. n. 117.

(i) 32. H.S. Brook. 1. Executor. 155.

(j) L. 3. C. de mil. testa.

(k) L. Hered. ff. de Reg. jur. &

ibi Cogn. &

Flowd. in Cas. inter Greish. & Fox.

(l) Terms of Law, verb. Exec.

part

(m) Fitz. Abr.
rit. Exec. n. 26.
Broo. cod. tit. n.
2. & 155.
(n) Fitzh. & Br.
ubi supra. & l. si
hared. de Eleg. 1.
(o) Fitz. & Br.
ibid.

part of the Will, or only of some part of the Testators Goods;

(m) in which respect such Executor may meddle with no more than is allotted to him, and so not chargeable but according to his portion. (n) And if there be no other Executor appointed, such particular Executor cannot meddle with the residue of the Goods; for of them the Testator by the Laws of this Land is said to die Intestate. (o) And thus in this case also may the same person die both Testate and Intestate, not only in respect of time, as aforesaid, but also in respect of Place and Goods, contrary (as was before declared) to the strictness of the Civil Law. In the same sense also one may be made universal or particular Legatary. And where the Testator leaves all his Goods, or the residue of them to some person, none else being appointed Executor, that person in Law seems to be appointed Executor thereof, at least admissible to the Administration.

3. A man makes his Will, and therein appoints two Executors, provided, That one of them shall not Administer: This *Proviso* was void *per Bednel & Englesby* Justices, because it restraineth the whole Authority given in the Premises. But *Fitzherb.* contrary, the *Proviso* is good: For an Executor may use Action, although he doth not Administer: And that a man may make one Executor of his Plate and Goods, another Executor of his Debts: Also one Executor of his Goods in one County, and another of his Goods in another County. (2)

(2). Trin. 5 H. 8.
fol. 14.

C H A P. IV.

Of substituted Executors.

1. Of Substitutions and appointing Executors by degrees.
2. Of the several kinds of Substitutions in the Law.

1. **T**HE Testator is then said to make degrees of Executors, when he doth substitute one in place of another: (a) For

(a) L. potest quis.
ff. de vulg. Subst.
& Inst. de vulg.
Subst. in prin. &
Franc. post. Glof.
in cap. ult. de
Testa. 6. & Broo.
tit. Exec. nu. 9.
(b) Ibid.
(c) Zaf. in Tract.
de vulg. in prin.

an Executor may be made either in the first, second, third, fourth or fifth degree, &c. (b) And he that is made Executor in the first degree, is said to be instituted, the rest are said to be substituted: (c) As thus, The Testator maketh A. his Executor, but if he will not, or cannot be his Executor, then he maketh B. his Executor, and if B. cannot or will not be his Executor, then he maketh C. his Executor; and so on. In which example there be three degrees of Executors; A. is said to be instituted Executor in the first degree; B. is said to be substituted Executor in the second degree; and C.

is said to be substituted in the third degree. And so it is lawful for a Testator to make as many degrees of Executors as he pleases; (d) and in the place of one only Executor, he may, if he please, substitute more than one. (e) Also it is lawful for the Testator to institute an Executor simple, and to substitute another in his place conditionally; (f) or to institute one conditionally, and to substitute another simple. (g) And so long as he that is appointed Executor in the first degree may be Executor, he in the second degree may not be admitted. (h) Likewise by the second degree the third is repelled, and be the third the fourth, &c. Also if but any one of the Executors in the first degree may be admitted, the Substitute is excluded, unless the Testator doth appoint to every Executor first instituted, his several Substitute respectively. (i) Also the Substitute ought to succeed in that part or quantity of the Testators Goods which was assigned to the former Executor. (k)

2. The Civil Law takes notice more especially of three kinds of Substitutions, *viz.* Express, Tacit and Mixt: As also of three kinds of express Substitutions, *viz.* General, Special and Singular, or Individual. An express General Substitution, as thus, *I institute A. B. and substitute C. D. my Executor.* An express Special Substitution, as thus, *If A. B. be not my Executor, then I substitute C. D.* An express singular or Individual Substitution, as thus, *If A. B. cannot, or will not be my Executor, I substitute C. D.* And it is the very nature of every Substitution, that the substituted succeed not, but after the instituted, and that to the same parts and portions, and under the same Conditions and Qualifications, in all respects, as the instituted, unless the Testator doth in terms otherwise express himself, and appoint: So that this Substitution is (as the word it self imports) no other than a Surrogation of one in the place of another. And sometimes the words of Institution may be such, as that they may seem to resolve themselves into a Substitution. And here observe, that every Substitution hath in it, either an express or implicate Condition; for which reason it is, That if an instituted Executor doth once accept the Office, and after die Intestate, the Substitutes in what degree soever, are all excluded, because the Condition in Law, *viz.* [If he will not or cannot be Executor,] was once accomplished by such Acceptance of the instituted Executor: (2) In which case Administration *de Bonis non* &c. is notwithstanding the Substitutes, to be committed unto whom by Law it appertains. Touching the subject of Substitutions, the Civil Law is exceeding voluminous, and but little thereof practicable with us; for which Reason not further to be here insisted on.

(d) Dist. 1. potest quis. ff. de Vulg. Subst. & Inst. cod. tit. in prin.

(e) §. plures. Inst. ibid.

(f) l. qui Liberis. ff. de Vulg. Subst.

(g) L. sub. Conditione. ff. hared. instit.

(h) L. quandiu ff. de Acq. hared. I cum in testa. ff. de hared. instit. & l. post ad c. de Impub.

(i) L. quidam. c. de Impub.

(k) L. i. c. eod.

(2) Bart. in l. i. ff. de vulg. & pupil. Subst. nu. 47. & Ripa ib. n. 85. & Dec. in l. post. ad. itam. c. de Impub. & al. Sub. nu. 2

C H A P. V.

Of the several ways of constituting Executors.

1. *The bare nomination of an Executor is the Creation of a Will.*
2. *Words implying an Executor equivalent to the word Executor.*
3. *Instances of a Executorship without naming the word [Executor.]*
4. *Small Errours in a Will, no prejudice to the Will.*

1. **T**HE bare naming of an Executor, in the name of a Will, without giving any Legacy, or appointing any thing to be done by an Executor, is sufficient to make it a Will, and as a Will it is to be proved; (a) for the naming of Executors is by Implication a Gift or Donation to them of all the goods, Chattels, Credits, and Personal Estate of the Testator, and the laying upon them an Obligation of satisfying the Testators Debts, to the just value of the said Goods and Chattels.

2. Although no Executor by the word [Executor] be expressly in the Will nominated or appointed; yet if any other words or circumlocutions equivalent to the Function of an Executor, or to the charge and office which in any part pertains to an Executor, be recommended or committed to any one or more, it shall amount to as much as the ordaining or constituting of him or them Executors by the very word *Executor*. (b) For the Law in the Interpretation of Wills and Testaments regardeth not so much the words as the meaning of the Testator. (c) Besides, it is not always necessary to express the word [Executor] in the making of an Executor: (d) Nor indeed hath every Testator skill enough so to do, or to think it necessary. (e) Wherefore it is sufficient, if the Testators meaning doth appear by other words of the like sense. (f) Hence then it is evident, that such words as do imply the Office of an Executor, are as valid as the word [Executor] it self: So that if the Testator declare by his Will, that *A. B.* shall have his Goods after his death, to pay his Debts, or otherwise to dispose thereof at his pleasure, or to that effect, he shall be his Executor. (g) Inasmuch, that he that doth commit all his Goods to the disposition of another, doth not die Intestate; yea, if only Administration be (by that word) in a Will granted to one, Executorship doth thereby pass. (h) And unto whom the Testator doth leave the residue of his Goods (none else as aforesaid being appointed Executor) to him the whole Executorship doth pass

(a) *Offic. Exec. c. 1. §. 1.*

(b) *Cum tibi de Testa. Extr. sum. Rosel. verb. testa. §. 1. ver. quibus verbis.*

(c) *L. quoniam. Mant. de Conject. ult. vol. 1. 4. 1. 3.*

(d) *Brook tit. Executor. nu 98.*

(e) *Panor. in c. Rannus nu. 3.*

(f) *In dict. l. quoniam. c. de Testa. & Mant. supra.*

(g) *39 H. 6. Dyer. 250.*

(h) *M. 15 & 16 Eliz. 21 H. 6. 6, 7 & 39 H. 6. Dyer. 250.*

by that general Legacy, at least the Administration, as aforesaid, is to be granted to such a general Legatary; the reason being, because the ignorant and vulgar sort know not, for the most part, how better to express their meaning of an Executor, or the function thereof. And as there are varieties of Words, Phrases, and Expressions, by each of which an Executor may be so appointed, as that it shall, if written, make the Instrument, otherwise the Nuncupation to amount to a Testament: So there is also by the Civil Law a threefold Testamentary Institution of an Executor; the one *Proper*, as when one is appointed Executor as to the whole Estate, or some certain part thereof. (3) Another *Improper*, as when the Testator makes his Child, or one of his Children Executor only as to so much as would, in case he had died Intestate, have been even by the Law of Nature due to him as a filial Portion; which that Law emphatically calls *Legitima*, being derived originally from the Law of the Twelve Tables, and since confirmed by divers other Laws of later Establishment. (4) The third *most Improper*, as when a general or universal Executor being instituted, the Testator makes another, and that a stranger, his Executor as to some certain particular thing. (5) But be it either of these, the Executor is in each obliged to observe the Will of the deceased, *de eo quod post mortem suam Testator fieri voluit*. But if *A.* doth make *B.* and *C.* his Executors, and then saith in his Will, That *D.* and *E.* shall have the Administration of his Goods and Chattels, this maketh not *B.* and *C.* Executors; but *D.* and *E.* shall be his Executors. (6)

3. If the Testator saith, I commit all my Goods to the Administration, or to the Disposition of *A. B.* in this case he is made Executor, it being in effect as if he had said, I make him my Executor: (2) Or if he saith, I will that *A. B.* shall dispose of my Goods which be in his custody; he is thereby made Executor of those parcels of Goods: (k) Or if the Testator saith I commit all my Goods to the hands and disposition of *A. B.* in this case also he is made Executor of all his Goods: (l) So also if he saith, I make *A. B.* Lord of all my Goods: (m) Or, I leave all my Goods to *A. B.* (n) Or thus, I make *A. B.* Legatary of all my Goods: (o) Or, I leave the residue of all my Goods to *A. B.* (p) Or if the Testator saith, I will that *A. B.* be my Executor, if *C. D.* will not, in this case *C. D.* is appointed to be Executor, and may, if he please, be admitted to the Executorship, and exclude *A. B.* (q) Or if the Testator supposing his Child, his Brother or his Kinsman to be dead, say in his Will, *viz.* Forasmuch as my Child, my Brother, &c. is dead, I make *A. B.* my Executor; in this case, if the person whom the Testator thought dead be alive, he shall be Executor: (r) Or if the Testator being demand-

(3) L. quoties. ff. de heredib. Instit.

(4) L. 1. 2. 3. ff. de petit. hered. & l. 1. § capities. ff. Ad Tertul. & l. 7. de Cap. minor.

(5) L. ex facto. & l. quoties. ff. de heredib. Instit.

(6) 21 H. 6. fo. 6.

(i) Dict cum tibi. De Testa. extra. & Sum. Rotell. ubi supra.

(k) Abridg. dez Cases f. 175. nu. 1.

(l) Brook Abridg. tit. Exec. nu. 98.

(m) L. his ver. ff. de her. inst.

(n) Gloss. Bart. & Bald. in dict. l. his verbis.

(o) Mant. ubi supra nu. 8.

(p) Panor. in dict. c. Ranu. de Test. extra. nu. 3.

(q) Jul. Cla. §. test. l. 35. nu. 2.

(r) Sichard. in Rub. de her. inst. c. nu. 3.

(f) Ripa. Alceat.
zafius. & alii D.D.
in l. 1. l. 1. §. si
quis ita. ff. de ver-
bor. Oblig. & Jul.
Clar. §. Test. q. 37

(1) Manic. de Con-
ject. ult. vol. 1. 4.
tit. 4. in prin.

(u) §. ante. inst. de
Legat. & Graf.
Thes. Com. Op-
inst. q. 1.

(6) L. 1. §. qui neg;
& §. hæc autem.
& §. si ex fundo. ff.
de hæred. instiit.

(-) Thelof. Synt.
jer. l. 42. c. 9. n. 9.

ed by another, Whether he doth make *A. B.* his Executor? doth answer, Yea, I do; or, What else; or, Why not? or, whom else should I make Executor? or, I cannot deny it; or other words to that purpose *cum animo Testandi*; this shall be a pure and simple Assignment of *A. B.* to be Executor. (f) Also, if the Testator doth make *A. B.* or *C. D.* his Executors; in this case both of them shall be his Executors, because (as aforesaid) *Or* is here taken for *And*: Provided always, in all the Cases aforesaid, and in every other the like Case, that the Testator have a firm and constant purpose and meaning to make his Will whensoever he uttereth any such words.

(t) And as it matters not by what significant words the Executor is appointed: So it is not material in what part of the Will or Testament he is appointed; as, whether in the beginning, or in the midst, or in the end thereof; (u) so as that he be therein expressed, or sufficiently implied as aforesaid. By all which it is most evident, that there is not any stated or prescript form of words necessary to be observed in the appointing of Executors; as, whether by way of Request, or Command; by way of Position, and directly; or by way only of Proposal, obliquely or indirectly; expressly, or implicitly; by many or few words, whereof five are enough to make a Testament, according to the *Ulpian* instance viz. *Lucius Titius mihi hæres esto*; yea three, viz. *Lucius hæres esto*; yea two, viz. *Lucius hæres*, or *Lucius esto*; yea one word only, viz. *Lucius*, if it may be sufficiently proved, that the Testator in so saying, intended to make his Testament; or did for that very reason pronounce that one word *cum animo Testandi*. (6) Provided also there be no legal Impediment in respect of the person of the Testator or Executor to invalidate the same: So that any words form'd into any kind, shall prevail for the Institution of an Executor, so as the Intention of the Will may but thereby appear liquid and indubitable. (7)

4. False *English*, or words misspelt in a Will, or other common mistakes, shall not prejudice the Will, or Disposition, or Executorship, if it may evidently appear what or whom the Testator meant, and that at the same time he was not *non sanæ memoriæ*; yea, though the Will want the words of Conclusion, viz. *In witness whereof*, &c. it is good, in case it may otherwise appear to be the Testator's Last Will and Testament.

C H A P. VI.

Of Incapacity to an Executorship.

1. *Of persons incapable of being Executors.*2. *Of other persons excluded by the Civil Law from being Executors.*

1. **A** Postates, (a) Traytors, Felons, (b) persons Out-lawed, (c) Incestuous, Bastards, (d) Famous Libellers, (e) manifest Usurers, (f) Sodomites, (g) uncertain persons, (b) and Recufants Convict, (i) are all excluded from being Executors, yet each of these hath his respective Qualifications. (k) And all these are incapable both of Executorship and Legacies, if they be such either at the time of making the Testament, or at the time of the Testators death, or when they assume the Executorship. (l) Yet Incestuous and Adulterous Bastards are incapable of being Executors only to, or receiving Legacies only from their own natural Parents, necessary means of Sustainment only excepted. (m) But as to other Legataries, it is sufficient if they are capable only at the time of the Testators death. (n) And the foresaid Rule relating to Incestuous Illegitimates, is attended with more Ampliations and Restrictions in the Law, than to insert here is adequate to the design of this summary Collection. Add to these, persons Excommunicated, who so long as they lie under the sentence of Excommunication, are not to be admitted either to Executorship, or to Legacy: (o) Nor during such time can such commence any Suit for Legacies; they cannot sue, that is proceed in suit as Executors, till they be absolved; for this works out a nullity of the Executorship, nor overthrows the Suit, but stays it only from proceeding until Absolution be had and obtained: (p) Yet a person Out-lawed (as is reported) also a person attained, may be an Executor: (q) Where it is also said, that an Alien may be an Administrator, and have Administration of Leases, as well as of personal things, because he hath them as an Executor in anothers right, and not to his own use. (r) Yea it is also said, that a Bastard, an Excommunicate, or an Out-lawed person, may be as able and as absolute an Executor as any other. (s) Also Infants may be made Executors; but the performance of that Office shall not be committed to them, until they have attained unto the age of seventeen years. (t) To the first forementioned, may be added Corporations, which although lawful ones, yet may not stand Executors, unless they can duly prove the Will, and take an Executor's Oath. Finally note, that what hath been here formerly said of Executors, may be also applied to, and understood of Administrators.

2. The

(1) ff. de his quæ pro non Script. habent. & ff. de his quæ ut indign. aufer. 2. The *Civil* Law divides all such as can have no benefit by a Will, either as Executors or Legataries, into two sorts; 1. *Incapable*. 2. *Unworthy*. (1) The later of these may take by a Testament, but not hold or retain what they take, whereby though they are capable by *Law*, they are incapable in *effect*. A Legacy bequeathed to the *Incapable*, doth by that Law accrew to the Executor; but if to the *Unworthy*, then to the Exchequer. To such as in the former Paragraph are excluded from being Executors, you may (according to this Law) add persons *Banished*. (2) As also such as are *Condemned* to death. (3) Likewise not only *Traytors*, but also the Sons of *Traytors*; (4) only their Daughters may as to their Mothers Estate, by that Law claim their filial Portions. (5) To these you may also add the Sons of *Traytors* against the Divine Majesty (which that Law terms Apostates and Hereticks) in reference to their own natural Parents; but not as to their collateral Kindred of the Line Ascendent, nor as to Strangers: (6) But if such Sons are themselves Orthodox, the Law is otherwise. (7) Likewise the *Arian* Hereticks are excluded from being Executors; (8) but not persons Excommunicated. (9) Moreover, by the *Civil* Law, *Aliens* may not be Executors, (10) unless they are so appointed in Military Testaments; (11) and the reason for that is, because in such Testaments respect is had only to the *Jus Gentium*. Likewise *Bastards*, such as are of a spurious Offspring, are excluded from being Executors by the *Civil* Law, or taking any benefit by a Testament, except for Alimentation, and that only by the *Canon* Law: (12) For the *Civil* Law excludes them also (as to Alimentation) from their own Parents; (13) except the Parent be *summus Princeps*, (14) or that the Bastard be appointed Executor only under a Condition of Legitimation. (15) Also *Idiots* and *Lunaticks* are excluded from being Executors, not only for that they are Incompetent to officiate, by reason of their want of understanding, or insanity of mind; but also for that they have not reason sufficient to determine, whether they will accept or refuse the same. (16) Lastly, by the *Civil* Law, the Scrivener or other, that though by the Testators order doth write the Testament, yet is so far excluded, as that he may not (albeit by direction from the Testator) write himself Executor in the Testament, nor therein write down a Legacy to himself; But must in that case desire some other to write that part of the Testament, for by that Law *tenetur Falsi*, if he doth it without the Testators privacy; and *tenetur quasi Falsi*, beside the forfeiture of all advantages thereby, albeit he doth it by the order and direction of the Testator de droict. Canon. Ranch. ad Guidon. Pap. q. 280. Text. in Novel. 89. c. 15. (14) De Præcis. lib. 3. int. 1. dub. 4. Sol. 2. nu. 11. (15) Covar. de Matrim. c. 8. §. 5. nu. 12. & de Præcis. ubi sup. nu. 8. (16) l. 2. §. furiosi. De Success. & l. 1. c. eod. l. 1. de Bon. poss. furios. L. Divus. §. ult. ff. ad Leg. Cornel. de Falsis. & l. 3 Cod. de his quæ sibi adscribunt.

C H A P. VII.

Of an Executor's Executor.

1. *That the Executor of a sole Executor, is Executor to the first Testator.*
2. *That an Executor's Executor cannot perform a Trust committed by the first Testator.*
3. *An Executor's Executor hath nothing to do with the first Testator's Goods where there is a surviving Joynt-executor.*
4. *In what Case an Executor's Executor shall have to do with the first Testator's Goods, when the surviving Joynt-executor shall not meddle therewith.*
5. *Cases in Law pertinent to the premises.*

1. **A**N EXECUTOR'S EXECUTOR, where there is no Joynt-executor, is Executor to the first Testator, as he is to the second, and consequently hath a right to all the profit, and is liable to all the charge that the first Executor had or was subject unto; yet with this caution and difference, that the one Testator's Goods shall not stand charged for the other Testator's Debts, but each for his own respectively. (a) And if in such Case the Executor's Executor assume the Administration of the first Testator's Goods, he cannot afterwards refuse the Administration of the Goods of the later Testator; but he may accept the later, yet refuse the former; but not *e contra*. (b) Also an Executor's Executor shall not be admitted to Administer the Goods of the first Testator where the first Executor (who was his Testator) refused to Administer, or died before Probate, (c) unless all the residue of the first Testator's Goods, after the Debts paid, be given in the Will to the first Executor. (d) And therefore if *A.* make his Will, and therein bequeath certain Legacies to *B.* and *C.* and give all the residue of his Goods and Chattels (after Debts and Legacies paid) to *D.* his Wife, and make her his sole Executrix, and she die before Probate of the Will, or any Election made by her, not knowing of the Will; and *E.* sue out Administration of the Goods of *A.* and pay the Legacies of *B.* and *C.* and *F.* sue out Administration of the Goods of *D.* the Wife-executrix: In this Case the Administrator of *D.* and not of *A.* the first Testator, shall have the Goods; for the Law doth judge them in *D.* the Executrix and Residuary Legatary after the Debts and Legacies paid, without any Election. (1) And therefore if an Executor make his Will, and die before he hath proved his Testator's Will, the Executor of such Executor may

(a) Stat. 25 E. 3. c. p. 4. & Coke 5. 9. & Plow. 86. & 34 H. 6. 14.

(b) Trin. 17 Jac. Com. B. Wolf and Heydens Case.

(c) Dyer. 372. & 23 Eliz.

(d) Adjudged in Hill. 9 Car. in Dens Case & Brownl. 1.

(1) Dyer 372 Co. 5. 9. Plow. 86. 34 H. 6. 14. Brownl. not 1. 52.

not prove both Wills, or become Executor to both the Testators, unless after Debts paid (as aforesaid) the residue of the first Testator's Goods were bequeathed to his Executor: In which Case the Executor of such Executor may take the Administration of the first Testator's Goods with his Will annexed.

(e) *Offic. Exec. cap. 20.* 2. Where a special Trust is by Will recommended to an Executor, as to sell Lands, &c. This being not performed in his lifetime, shall not be performable by his Executor after his death. (e) Contrariwise it is of an interest, as to take the profits of Lands for certain years towards payment of Debts and Legacies, or for recovery of Rents of Inheritance left unpaid in the Testator's lifetime.

(f) *Brook. Abridg. tit. Execut. nu. 92 160.* 3. If two Executors be appointed, whereof one maketh his Testament, wherein he nameth his Executor and dieth, his Joynt-executor surviving; in this Case the Executor of the Executor is not to be joyned with the said Joynt-executor surviving, neither in the execution of the Will, nor in Suits or Actions. (f) And if such Executor of the Executor have any Goods which belong to the first Testator, the surviving Executor of the same first Testator, may have an Action against such Executor's Executor for the same. (g) Inasmuch, that if the surviving Executor doth afterward die Intestate, yet may not the Executor's Executor meddle with the Goods of the former Testator: for the power of the Executor who died first, was determined by his death, the other then surviving: (b) And the Judge in this Case may commit the Administration both of the surviving Executor who died afterwards Intestate, and of the Goods of the former Testator not before Administred. And if the Executor of the Executor who died first, meddle with the Goods of the first Testator, he may be sued by the Creditors of the first Testator, as Executor in his own wrong: (i) But where there is no Joynt-executor, there most things which concern immediate Executors, extend also to the mediate or more remote Executors; that the mediate Executor in the fourth, fifth, or further degree stands in like manner Executor to the first Testator, as the first and immediate Executor, and may sue or be sued as the former. (k)

(k) *Offic. Exec. cap. 20.*

(l) *Dyer 160.*

4. Suppose two Executors, whereof one refuses to prove the Will and Administer; the other proves it, Administers, and dies Testate: In this Case the Executor of that Joynt-executor that so proved the Will, shall be the first Testator's Executor; and the surviving Executor so formerly refusing, shall not now be admitted to intermeddle therewith, because his Election determined at his Co-Executor's death. (l) But it is otherwise where the surviving Executor hath accepted the Executorship; for in that Case he shall have the sole disposing of the Estate, and the Co-executors Executor

cutor is not to intermeddle therewith, but to surrender to the other what Goods belonging to the first Testator happen to be in his custody.

5. Error, the Error assign'd was, That *W. E.* had brought Debt upon an Obligation by the name of *W. E. Administr. Bonorum & Catallorum A. E. durante minori etate of J. E.* Executor of the said *A. E.* Executor of *R. E.* and demands a Debt upon an Obligation of Twenty nine pound made to the said *R. E.* the first Testator, whereas he could not bring an Action by this name, but as Administrator of *R. E.* But it was said, that Administration of the Goods of *R. E.* being committed to him by this name, *omnium Bonorum, &c. A. E.* it may well be committed to him by this name; especially when *A. E.* did not die Intestate, but made an Executor; 10 *Ed. 4. 1.* That by the grant of the Administration of the Goods of the Executor, Administration is by it granted of all the Goods of the first Testator, 27 *H. 8. 7. Curia, Contra* clearly. For by this Administration committed, he hath no Authority to meddle with the Goods of the first Testator; and for this cause the Judgment was reversed.

Pasch. 3 Eliz. Moo. Rep. nu. 8.

Debt against the Executor of an Executor. The Defendant pleaded, That the Executor's Testator had fully Administred, and that he had nothing in his hands at the time of his death; and it was found that he had Assets. Whereupon a *Fieri facias* issued to the Sheriff, and he returned, that the Defendant had nothing. And it was held, that the Sheriff should be amerced, for he should have stop't making such Return: And that it should be no prejudice to the Plaintiff, for that the Debt shall be charged so long as the Record remains in force not reversed by Error nor Attaint. And if he hath no Goods of the Testators, he shall be charged of his own proper Goods; for that when he pleaded that the first Testator had fully Administred, he did not say, that Assets did not come to his hands after his Testators death.

If an Executor recover a Debt of his Testators, and die Intestate, his Administrator may not have a *Scire facias* to recover this Debt: And yet where Judgment is given against an Executor for the Testators Debt, and such Executor die Intestate, this may be executed by *Scire facias*, against the Administrator of the first Testator, who represents the person of his Executor, and being for the Debt of the first Testator, is liable thereunto, but as Administrator to the Intestate Executor, he is not liable. (1) But if an Administrator have a Judgment for the Debt of the Intestate, and die Intestate, such Administrators Executors may not sue out Execution of that Judgment. (2)

(1) Croo. 1. 119.

164.

(2) Co. 5. 10. 25

H. 8. 7.

C H A P. VIII.

Of an Executor in his own wrong.

1. *Who is an Executor in his own wrong, and what Acts make him such.*
2. *How far an Executors in his own wrong is chargeable; and how impleadable.*
3. *What Acts shall not make a man Executor in his own wrong.*
4. *A caution to avoid wrongful Executorship, as also for Creditors in their Suits against wrongful Executors.*
5. *Law Cafes to this Subject relating.*
6. *What Acts shall amount to an Administration, according to the Civil Law.*

What an Executor in his own wrong is: See Terms of Law.

Kelway 59. 93.
Dyer 105, 157, 255
Coke 5. 32. Brook.
tit. Exec. 162.
(a) 8, & 9 Eliz.
Dyer. 255. 256.

(b) Coke. lib. 5.
Relat. fo. 33.

(c) L. in caus. ff.
de Minor.

(d) Coke ubi. su-
pra. fol. 30. in
Coults Case.

1. **A**N Executor in his own wrong, is he that takes upon him the Office of an Executor by Intrusion, not being so constituted by the deceased, nor for want of such Constitution, substituted by the Court to Administer. Yet this extends not to Overseers, who seeking only to preserve and keep in safety the deceased's Goods from damage, without any dispending or disposing the same, are excused from being Executors in their own wrong: (a) But if one who neither is Executor nor Administrator shall use the deceased's Goods, or possess himself thereof, this is a sufficient Administration to charge him as Executor in his own wrong, whereby the deceased's Creditors may recover their Debts against him, if there be no other Executor or Administrator lawfully constituted, who hath proved the Will or Administered. (b) Yea, though there be a lawful Executor, yet if any other take these Goods, claiming them as Executor, does pay or receive Debts or pay Legacies, and intermeddle as an Executor: In this Case, because of such express claiming to be Executor, he may be charged as Executor in his own wrong, although there be another Executor of right. (c) Also, he that takes the deceased's Goods to satisfy his own Debts or Legacy, shall be charged as Executor in his own wrong. (d) Also, if one do either pay Debts of the Testators, or receive Debts, or make Acquittances for them, or demand the Testators Debts as Executor, or give away Goods which were the Testators or deliver money of the Testators, for Fees about proving the Will; or being sued as Executor, do take it upon him, and plead in Bar as an Executor: All these are an Administration, and will make him Executor in his own wrong, although there be an Executor or Administrator of right:

right : (e) But if he pays Fees or Debts only with his own (e) *Office. Exec. c.*
Moneys, then it is otherwise : For such Acts do not amount to 14.
any Administration of the deceased's Goods ; but whatever is
done, by a stranger, that is proper only to the Office of an Exe-
cutor, shall charge him as Executor in his own wrong. Likewise,
if he that is named Executor in the Will, take Goods of the Te-
stators, and convert them to his own use ; yea, if he do but take
them into his hands without converting them ; yea, if the Wife
named Executrix, or, or not named, take more Apparel of her own
than is necessary, this is an Administration : But if by the assent
or delivery of the Executor, it is not. (f) And if he that from (f) *Ibid. c. 3. &*
the Judge hath Letters *ad Colligendum*, do sell or dispose of any (f) *Dyer. 105. & 166.*
Goods, though otherwise subject to perishing, it makes him an & 33 H. 6. 33.
Executor in his own wrong ; yea, though by the said Letters *ad*
Colligendum warranted so to do, for the Judge himself may not so
do. (g) So that if the Ordinary, without formal Letters of Admi- (g) *Ibid. cap. 14.*
nistration granted, do give one Licence and Authority to sell the
Goods of the Intestate *quæ peritura essent*, and he doth it accord-
ingly, he which doth so Administer, shall be as an Executor of his
own wrong. (h) Also if another man doth take the deceased's Goods (h) 9 *Eliz. 256.*
and sell or give them to me, this shall charge him as Executor of *Dyer.*
his own wrong, but not me. Also, if a man make a Deed of
Gift of all his Goods and Chattels to another, and dieth Intestate,
and this Deed be but fraudulent, and in trust, and the Donee after
the death of the Donor, doth dispose of these Goods and Chat-
tels in this Case, and by these means he shall be Executor in his own
wrong. (i) But if the Deed of Gift be *bona fide* in satisfaction of (i) 1 *Brownl. 103.*
a just Debt, and if the Goods be no more than the Debt, it may by *Goldsb. 116. pl.*
otherwise : But if the Goods be much more than the Debt, there 12. 2 *Brownl.*
it seems he shall be charged so for the Overplus, and that whether 384. 385.
he have them in possession or not. (k) So that it is evident, that a (k) *And so was the*
man may make himself Executor in his own wrong, either by *Opinion Justice*
proving the Will with the deceased's money, or by converting his *Jones at Glo-*
Goods to his own use, or by delivering his Money or Goods to *cester Assize,*
his Creditors in satisfaction of their Debts, or by received Debts 9 *Car.*
due to the deceased, or by releasing them, or by delivering any Le-
gacies in kind given by the deceased, or by taking a mans own Le-
gacy before the Executor hath accepted of the Executorship, or
assented to the delivery thereof, or by suing as Executor for any
debt due to the deceased, or by answering as Executor to any Plea
commenced against him as such, or by selling any part of the de-
ceased's Goods as his Executor, or by discharging the Mortgages
of the deceased with his Money : By these and many other ways
a man may become Executor in his own wrong. And therefore
if a man being appointed Executor or Administrator, shall as such,

and by that Appellation and Distinction, Commence an Action (as aforefaid) for any Debt owing to the deceased, or being by that name sued for any Debt or Duty due from him, shall *imparle* to the Suit, or plead any Plea other than *ne unques Executor*, or Convert the deceased's Goods to his own use, or alter the Property thereof by Sale, Gift, or otherwise (without any Declaration by him, That this he doth not as the deceased's, but as his own Goods) or in satisfaction of Debts or Legacies, pay the deceased's Mony, or deliver his Goods to Creditors or Legataries, or receive any Debt due to the deceased, or release any before, or discharge any after it be paid, or pay any Debt due from the deceased, with the deceased's, and not his own money: Any of these Acts will so amount unto an Administration, and to such an acceptance of an Executorship in an Executor, that an Executor or Administrator can never after any such Act done, refuse the Executorship or Administration. (1)

(1) Broo. Administrat. 35, 26 Executor. 165. 132.
Dyer. 135. Brown l. 2. 58.

Two Executors were joyntly made and appointed in a Will: One of them doth after release a Debt due to the Testator; he that so released, doth before the *Ordinary*, after refuse to Administer: And it was agreed by all the Judges, That it was too late, for that he had made and determin'd his Election by the said Release. (2)

(2) Ibid.

A Woman Sole was made Executrix, she married before she intermeddled with the Estate; after her Husband doth Administer: This is such an acceptance of the Executorship, as will bind and oblige her, so as that she can never after refuse it. (3).

(3) Brook. Executors. 157.

2. The Executor in his own wrong, thereby renders himself not only obnoxious to the Action of the right Executor, but also to the Suits of the Testators Creditors, yet but only so far as the Goods which he so wrongfully Administred do amount unto.

(4) Coke. lib. Inft. 144. 145.

(1) And this usurping Executor or Executor in his own wrong, is not in Suit to be distinguished from the lawful Executor by name or title, but to be sued generally by the name or title of the Executor of the Last-Will and Testament of the defunct; which if he deny, he much plead that he neither is Executor, nor Administred as Executor; yet where there is a lawful Executor, and another doth Administer in his own wrong, it is at the the Election of the Creditors either to sue them joyntly together, or one or both of them severally, and by himself. But note, that there cannot be an Administrator by wrong, or in his own wrong, for the Law knows no such Appellation. Also, if the next of Kin to the deceased procure some insolvent person or stranger not only to take out the Letters of Administration, but also to make himself a Deed or Gift of all the Goods for an invaluable consideration, he may be thus charged for the Overplus of the worth of the Goods more than

than he give, if not for the whole. And if a Debtor procure such an Administration to be taken out, and then get a Release of his Debt from such Administrator, this may make him chargeable as Executor in his own wrong, for so much as his Debt doth amount unto. (m) So that all wrongful Executors, of what kind soever, do, for so much as they have disposed, and no more, make themselves chargeable to any Creditor or Legatee of the deceased, as far forth as any lawful Executor is chargeable. (n) And if Administration be granted to any one after he hath intermeddled wrongfully with the deceased's Goods, this will not purge his wrong done before; and therefore in this Case a Creditor may charge him as Executor in his own wrong, or as a lawful Administrator at his Election. (o) And the Case may be, where the bare possession of Goods shall charge a rightful Executor, rather than his Executorship: As where one man delivers goods to another, who makes two Executors, and dies; whereof the one happens to have these Goods in his possession, and an action of Detinue is brought against him only for the same: In this Case it was adjudged to be good; for the possession of the Goods doth charge him, and not the Bailment nor the Executorship. (1)

3. When the Will is with proved, or Administration granted, and others then intermeddle with the Goods, this shall not make those others Executors in their own wrong by construction of Law, because there is then another Executor of right, against whom the Creditors may bring their Action; (p) and such wrongful intermeddlers with the Goods when there is another Executor of right, are liable to be sued by him as Trespassers. Also, if a man perform only acts of Charity, or of Humanity, as feeding the Testator's Cattel, (q) or preserve them by taking them into his custody, or dispose of them only about the Funerals, (r) or make an Inventory thereof, (s) or deliver the Widow only her convenient Apparel, or as a meer Trespasser, entereth to his Goods, whether quick or dead, converting the same to his own, not to the Testator's use; he doth not hereby become Executor in his own wrong, when there is an Executor or Administrator of right (t) But if one deliver to the Widow more of her Apparel than is convenient to her degree, or if she take, or another deliver to her more than such, he or she thereby becomes Executor in their own wrong. (u) But if a man lodge in my house and die there, leaving Goods therein behind him, I may keep them, until I can be lawfully discharged of them, without making my self chargeable as Executor in my own wrong. (w) Or if I take the deceased's Goods by a mistake, supposing them to be my own, or under colour of a Title, this will not make me Executor in my own wrong: Or if one do but take a Horse of the deceased's, and tie him,

(m) Stat. 43 Eliz. cap. 8. & Pasch. 7 Jac. C. B. per Chief Justice.

(u) Dyer. 255. 166. Coke, 5. 34. 9. 29. & 5. 33. & Plowd. 148. 145. & 33 H. 6. 31. & Dyer. 210. & Powd. 184.

(o) Coke 5. 33. Kelw. 59. Pasch. 39 Eliz. & Brownl. 1. part. 183. & 2. part. 184, 185.

(1) 29 Ed. 3. fo. 5.

(p) L. in Cuas. ff. de Minor.

(q) Fitz. tit. Executor. nu. 4. 5.

(r) Brook. tit. Admin. nu. 6. 28.

(s) Mantie. de Conject. ult. vol. lib. 12. tit. 9. n. 15.

(t) Broo. tit. Executor. nu. 16. & tit. Admin. n. 42.

(u) 11 H. 6. 28. & 33 H. 6. 31. & 1 Eliz. Dyer. 166.

(w) Trin. 17 Jac. per Chief Just.

(x) Coke 5. 34. & Kelw. 63.

(y) Crook Rep. in Case. *Whitmore* vers. *Porter*. Mich. 3 Car.

(z) Coke, lib. 5. 33. & 34.

(1) Brook. Administ. 35, 36. Executor. 165. 132. Dyer 135. Brownl. 2. 58.

(a) Brook tit. Administ. nu. 26.

him in own Stable, this makes him not Executor in his own wrong: Or, if I do only lay up the Goods of the deceased to preserve them in safety for him that shall have right to them. This will make me no more chargeable, than if I took an Inventory of all the deceased's Goods. (x) Nor is an Executor in his own wrong chargeable as such, where an Executor of right, or Administrator hath fully Administred the deceased's Goods. (y) Nor shall any light acts or intermeddlings make one an Executor in his own wrong, where there is a rightful Executor, and a Will by him proved, or Administration committed, or where there is another of right to be sued; for whoso wrongfully takes the deceased's Goods from the rightful Executor or Administrator, makes himself not an Executor, but a Trespasser to them; though it would have made him an Executor in his own wrong, had there not been an Executor by right, (z) who (notwithstanding the other) stands charged with, and is liable for the Debts of the Testator. It is further affirmed by others, that only to lay up and preserve the deceased's Goods, to command another to take them away from one that hath them in his keeping, to see the deceased buried in a decent manner, to use, and (if need be) to sell some of his Goods, for that purpose, to make an Inventory of his Goods and Chattels, to prove the Testator's Will, not with the Testator's, but with his own Money, to take his own Goods lying among the deceased's, to take and use some of the deceased's Good only by a mistake, or as a Trespasser, or by the delivery of another, to take and dispose any of the deceased's Goods, where, an Executor or Administrator doth challenge them as his own, and in his own right, to redeem any of the deceased's Goods, not with the deceased's but with his own money, being pawn'd to the full value, and the day of Redemption past: None of these acts or things, according to the Common Law (as affirmed) will either make a man Executor *de son tort*, nor amount unto an acceptance of an Executorship, nor make an Executor or Administrator chargeable as such. (1)

4 Whosoever feareth to be adjudged Executor in his own wrong, his safest course it not to meddle at all, but utterly to abstain from all manner of use of the deceased's Goods; and especially let him take heed that he do not sell any of the deceased's Goods, nor receive any of his Debts, nor kill any of his Cattel. (a) And if one, after wrongful Administration of some of the deceased's Goods take Administration, and after such Administration taken be sued by a Creditor for a Debt as Administrator, and after such wrongful Administration, there remain not Goods sufficient to pay the Debt, the Creditor can recover no more than remained after such rightful Administration taken, because he sued him as Administrator; therefore he should in such case have sued him as Executor,

Executor, because he was Executor in his own wrong before he took Letters of Administration; and so then the Goods which were Administred before the taking such Letters of Administration, must thereby be included to be liable for the Debt due to the Creditor, otherwise not. (b) Therefore Creditors must look before they sue, for else they know not whether he so intermeddling be Executor or Administrator, not consequently how to found their Action aright, and safely for good success; since a suit against an Executor as Administrator, or against an Administrator as Executor, will prove frivolous; one Errour in a Foundation may be the Foundation of many in the Superstructure.

5. One sued as Executor of his own wrong: Upon the evidence it appeared, That he had entred upon the Land Leased to the Intestate, and had received the profits thereof; and was sued for the Rent by the Lessor of the Intestate: And by this it was conceived, That he was *Executor of his own wrong*. (1)

(1) Clayt. Rep. Casé, 203.

He that hath once made himself Executor of *his own wrong*, albeit he should after deliver the Goods of an Intestate to the rightful Administrator, and before any Action brought against him, yet he cannot discharge himself of what Action may come against him, by saying, That he delivered the Goods of the Intestate to the Administrator. (2) For he that hath made himself once so chargeable, can never after discharge himself by any matter *ex post facto*. (3)

(2) Crook. 1565.

(3) Idem 3. 165.

The Commissary of the Bishop of a Diocess granted Letters *ad Colligendum & vendendum ea quæ peritura essent, & inde Computum reddere*, The Grantee sold Goods which would not keep, but perished: and an Action of Debt was brought against him as Executor in his own wrong; and it was judged maintainable, because the Ordinary himself had not such power, and therefore he could not give it to another. (4)

(4) 9 Eliz. Dyer. 256.

A. brought Debt upon an Obligation of Forty pound against L. as Executor of P. the Defendant pleaded, That P. in his lifetime was indebted to him in Forty pound, and that there came to his the Defendant's hands Goods to the value but of Ten pound, which he retained towards satisfaction of his own Debt, and averred that no other Goods beyond that value of Ten pound came to his hands to be Administred, &c. The Plaintiff replied, and shewed, That the Defendant is Executor in his own wrong to P. and that he hath much other goods belonging to P. to be Administred at S. in the County of N. and concludes, *& hoc paratus est verificare, &c.* The Defendant rejoyn'd and demanded Judgment, whether the Plaintiff shall be admitted to plead, That the Defendant is Executor in his own wrong, inasmuch as himself hath by his Declaration affirmed him to be *Executor Testamenti*; upon

Mich. 6. Jac. B.R. *Alexander & Lanes Case*, with *West*, and *Lanes Case*. Yelv. Rep.

which

reland. 5. Rep. fol.
30.

which the Plaintiff demurr'd in Law : To which point in Law the whole Court would hear the Plaintiff, for he could well reply, That the Defendant (notwithstanding the Declaration) is Executor in his own wrong ; for there is no other Form *de Court* as was adjudged in *Coulter's Case* : But *per tot. curiam* the whole Plea is discontinued ; for the Defendant having pleaded, That as to the Goods to the value of Ten pound, he had retained them for Debt to himself, and that he had no more Goods to be Administred, it was an Offer of a good Issue ; and then when the Plaintiff replied, that he had other goods, &c. & conclude, & *hoc paratus est verificare*, it is not good ; for he ought to have said, & *hoc petit quod inquiretur per patriam*, for that there was any surplussage of Goods when denied by the Defendant, and urged by the Plaintiff, he ought to have come to an issue, but could not by reason of the ill conclusion. And in the same Term between *West* Plaintiff, and *Lane* the same Defendant, where *West* demanded four pound Debt against *Lane* as Executor, *ut supra*, and all the rest of the Plea was *ut supra* : Judgment was given for the Plaintiff, because the Defendant had confes'd Goods to the value of Ten pound in his hands, which is more than the Debt in demand ; and therefore it being in the Judgment of the Law, That an Executor in his own wrong cannot Retain to pay himself, Judgment shall be given only upon the Defendant's own confession, and so it was : *Quod nota. Yelw.* a Counsel *pro Querent.* And in Debt brought against an Administrator, it was the opinion of all the Justices, That an Administrator, might retain monies in his own hands of the Intestates, to satisfy a Debt due to himself ; But an Executor of his own wrong shou'd not retain to satisfy his own Debt. (5)

(5) Mich. 11. Jac.
C.B. Bond & Greens
Case. Godb. 216.
vid. Co. 5. part.
Coulter's Case.

Case *Ampson* a-
gainst *Stockburne* &
Ux. Noy.

Note, by *Popham* and *Williams* in the Case of *Ampson* against *Stockborn*, That an Executor in his own wrong shall be sued for Legacies, as well as the lawful Executor ; but *Yelverton* doubted it.

Trin. 28 Eliz. B.R.
Stuvs vers. *Right-
wife.* Cro. Rep.
par. 3.

Debt against the Defendant as Executor of *J. S.* he pleads, That he had taken Letters of Administration, Judgment of the Writ, &c. The Plaintiff replied, That the Defendant Administred *de son tort*, and after took Letters of Administration, Judgment, &c. And upon this it was demurr'd : *Godfrey* for the Defendant argued, That now the name of Executor is lawfully changed before the Action brought, and therefore is to be sued by his new name as Administrator, 9 Ed. 4. 33. 21 H. 6. 5. 18 H. 6. 29. 13 H. 4. Executors 118. *Coke contra* ; for when by his tortious Administration he hath given advantage to be sued as Executor, he cannot by his own act purge this tort, and cause the Plaintiff to sue him by another name, but the Plaintiff hath Election to sue him one way or other, for he shall take no advantage by his own Tort ;

as if one in Execution escapes, and is taken away by the Gaoler, he shall not have an *Audita Querela*; and it will be a mischief if the Plaintiff shall be compell'd to sue him as Administrator, for it may be, that whilst he Administr'd of his own wrong, he wasted the Goods; and if he be only sued as Administrator, he shall only be charged of the Goods which came to his hands since Administration, 12 R. 2. Administrators 21. And it was afterwards adjudged, that the Writ was good, and that the Defendant *respondra ouster*. *Nota*, if Judgment be given against an Executor upon Demurrer, and Execution be awarded, the Sheriff cannot return, *nulla habet bona Testatoris*, but is to return a *Devastavit*, as if it had been found against the Executor by Verdict, for *per Curiam* he hath charged himself by his own Plea.

Debt *per &c. vers. &c.* as Executor, he pleaded, *Nunques Executor, &c.* and on special Verdict found, that Administration of the Goods of the Testator was committed to the Wife of the Defendant, who is dead, and that he kept *bonam partem bonorum* in his hands, and sold them. *Williams* moved, this Verdict was void for the uncertainty; for *bonam partem* is altogether uncertain: But it was held to be well enough, for if he detain any part, it makes him Executor *de son tort*; wherefore it was adjudged for the Plaintiff. Yea, in some Cases, though put into possession thereof by the Testator himself in his life-time: For in Debt upon a Bond, as Executor of his own wrong, and *Plene Administravit* pleaded, the Case was this, The Defendant had been bound with the Intestate, as his Surety, for a great sum; and the Intestate having a desire to save himself harmless, did upon his death-bed make the Defendant a Deed of Gift of all his Goods: But they were not removed, but remain'd in the Intestates possession for that little time he lived after; and it was held a *Fraudulent Deed of Gift.* (1)

Anonymus, Hill.
38 Eliz. C. B.
Cro. Rep. par. 3.

(1) *Clayt. Rep.*
Case 66.

A very small matter may make a man Executor in his own wrong, at least so in effect, especially if being sued, he plead a false Plea. Note to this purpose, in an Action of Debt against A. as Executor in his own wrong, he pleads *ne unque Execut. &c.* And it is found against him, and Execution by the Court against him for all the Debt, *viz.* 60*l.* for his false Plea. Although in truth he had not meddled but with one bedstead of small value. And it was said by *Daniel*, That in 39, 40. *Eliz. C. B. Kitchen* against *Dixon*, that one Mr. *Offley* for such a false Plea, was charg'd to pay 100*l.* and he had meddled but with one Bible. A Caveat against false Pleas, and to plead well the special matter, lest the Executor in his own wrong, or other, be charg'd with more than ever he received.

Robin's Case.
Noy. Rep.

Pasc. 39 Eliz. C. B.
Bradbury vers.
Regnell. Cro. Rep.
par. 3. Pl. 27.

Debt against R. as Executor of T. The Defendant pleads, that T. died Intestate, and that certain of his Goods came to the Defen-

dants hands, and afterwards Administration was committed to J. S. to whom he had delivered the said Goods. *Et per Curiam* it is not any Plea; for if Administration had been committed to himself, it would not have purged the first tort: So here, although Administration is committed to a stranger, in regard that he hath once made himself chargeable to the Plaintiff's Action as being Executor *de son tort*, &c. he shall never after discharge himself by matter *ex post facto*. Wherefore, &c. *Adjornatur. & vid. 21 H. 6. 8. 9 Ed. 4. 47. 2 R. 3. 20.*

Trin. 12 Jac C.B.
Kehle & Osbaston's
Case. Hob. 49.

The Executor of A. brought Action of Debt against B. as Executor of D. upon a Bond. The Defendant pleaded, that D. died Intestate, and that before the Writ brought, Administration of his Goods was committed to N. who Administred, and yet doth: The Plaintiff replied, That D. died Intestate, and before the Administration granted, divers Goods of his came to the Defendant's hands, which the Defendant as Executor of the said D. Administred, *seu aliter ad suum proprium usum disposuit*: Whereupon Issue being joyned, it was found for the Plaintiff; for since there was an Executor before the Administration afterwards granted, the Plaintiff had cause of Action vested in him, which shall not be taken away by such Administration afterwards granted, though it be before the Action brought; and so much the rather, because the Goods taken by wrong before the Administration, shall not be Assets in the hands of the Administrator, till they be recovered, or damages for them.

2 Mar. Dyer.
105, 106.
Dyer. ibid. &
Co. 5. par. 33. vid.
Porter's Case.
1 Eliz. Dy. 166.
2cc.

Case Palmer a-
gainst Litherland.
Noy.

A Woman Executrix taketh a Husband; afterwards they are divorced upon a Pre-contract, the Wife appeals to the Delegates, and pendant the appeal the Husband Administred the Goods, and then dieth. It was a Question, Whether the Husband should be said to be an Executor in his own wrong? *vid. 2 Jac. Co. 5. Read's Case 33.* That when a man dieth Intestate, and a stranger taketh his Goods, and useth them, or sells them, he is an Executor of his own wrong; for they to whom the deceased was indebted, have not any other against whom they can bring their Actions for recovery of their Debts. And so note, that the very seizure of Goods will make one an Administrator of his own wrong. It is otherwise at the Civil Law, unless he convert them to his own use, as will more fully appear in the close of this Chapter. And in the Case of an Executorship during Minority, it was agreed by *Doderidge* and *James*, That an Executor *durante Minori etate*, if he waste the Goods after the age of the Infant, shall be charg'd upon the special matter, and not as Executor in his own wrong; because he had a lawful Authority to that time. *6 Rep. 18. b.*

Debt against G. as Executor to H. the Defendant pleads, that H. the Testator was bound in a Statute of One hundred pound, and besides that he had not Assets; and hereupon they were at Issue, and a special Verdict found, That the Defendant was Executor *de son tort demesne*, and that the Testator was indebted unto him, and that he retain'd divers goods to satisfy that Debt due unto himself, and over and above then to satisfy the Recognizance he had not in his hands, &c. & fi, &c. It was argued by *Tansfeld* and *Goldsmith* for the Plaintiff, and by *Coke* for the Defendant. The sole point was, Whether an Executor *de son tort* may retain Goods to satisfy himself? And *Coke* moved that he well might; and the Plaintiff by this Action against him, hath allowed him to be rightful Executor; wherefore the finding that he was Executor, *per tort*, is not material; and he being allowed to be Executor, may do all things as an Executor, *viz.* pay Debts, or any other lawful acts; and as he may do it to a stranger, so he may pay himself. *Gawdy* and *Fenner* were of his Opinion. For as he shall be charged by reason of his possession; like reason it is, he should be allowed all lawful acts; and this is here a lawful act, as where, &c. *Popham* and *Clinch e Contra*: For an Executor *de son tort* shall never have any benefit by his Malefance, and, &c. A Precedent was cited, *Pasch.* 32 *Eliz.* in C. B. That an Executor *de son tort* might not retain to satisfy himself, wherefore, &c. Afterwards upon another day it was moved again, and the Court said, They were resolved, That an Executor *de son tort demesne*, cannot retain Goods to satisfy himself his own Debt. And *Popham* said, That divers of the Justices in *Serjants Inn* (to whom he had propounded the Case) were of that Opinion, and that they were resolved to enter Judgment for the Plaintiff: But it was then furnished to the Court, that the Defendant was dead, and thereupon a stay of Judgment was prayed; but the Court would not stay it upon such furnise: But upon the Plaintiffs prayer Judgment was entred, 5 Co. 20.

Ejectione firme, for *Whites Clofes*, upon Not-guilty it appear'd upon the Evidence, That a Lease for years was granted to one *Okeham*, who died Intestate, and *Anne* his Wife assigned it *per paroll* to one *Burgess*, and after she got Letters of Administration, and made an Assignment thereof to one *Kenrick*. And the Court directed the Jury for *Kenrick* the last Vendee; yet they agreed, That if one enter as Executor of his own wrong, and sell Goods, and after obtain Letters of Administration, the Sale is good; but in this Case there is a Term in Reversion, whereof no Entry can be made, nor can any man therein be Executor of his own wrong; and therefore the first Sale to *Burgess*, before Administration, is utterly void.

Pasch. 40 *Eliz.*
B. R. *Ireland.*
vers. *Coulter.*
Cro. Rep. par. 2.
vid. Rep. at large.

Pasch. 25 *Eliz.*
B. R. inter *Ken-*
rick & Burgess.
Mo. Rep. n. 273.

Hil. 40 Eliz. B.

R. Coulter vers.

Ireland. Moo.

Rep. n. 696.

& 664.

Pasc. 34 Eliz. C.

B. Bradbury &

Reynolds Case.

Cro. 3. part. 565.

Hugh's Abridg.

Vol. 3. tit. Execut.

At the *King's-Bench* in Debt, all the Justices of *England* being assembled at *Serjeants Inn*, it was adjudged, That an Executor of his own wrong cannot pay himself either Debt or Legacy.

Debt against one as Executor: The Defendant pleaded, That the deceased died Intestate, and that certain of his Goods came to the Defendant's hands, and that Administration was committed to J. S. to whom he delivered the Goods. It was adjudged no Plea, in regard he had once made himself chargeable to the Plaintiffs Action as Executor of his own wrong, he shall never discharge himself by matter *ex post facto*.

Note, In an Action of Debt brought against A. as Executor in his own wrong, he pleaded *ne unq; Executor*, and it was found against him, and Execution was awarded against him for the whole Debt, *viz.* Sixty pound for his false Plea, although in truth he had not intermeddled but with one Bedstead of small value; and so it was said it was adjudged, 40 Eliz. in C. B. in *Kitchin* and *Dixons* Case. So where an Action of Debt was brought against one as Executor of *his wrong*, who pleaded that he never was Executor, nor Administred as Executor, it was in that Case held, That it was not material, whether he had *Assets* or no: But to prove that he had Administred any thing, though of never so small a value, was enough; for in this Case, that was sufficient to make him chargeable with the whole Debt: But if he had not made a false Plea, he had not been chargeable with more than the value of the deceased's Goods that came to his hands. (1)

6. Notwithstanding the premises, this may stand as a Conclusion, That whatever acts done by a lawful Executor, do by Implication of Law amount to an Acceptance, and thereby determine his Election, so as that he may not after refuse: The same acts, or any of them, done by a stranger, will make him Executor of his own wrong. Now of the signs and marks of such an Administration, the Law makes a threefold division: The one consisting in overt acts, another in words, and the third merely in conjectures. But if the matter be only doubtful, the Law will not presume an Administration. (2) Or if it be merely by conjectures, they ought in that Case to be no other than such as are clear, certain, full and concludent. And the Rule is, That he shall not be said to have Administred, who doth only that, which being done, doth not fall within the Office or Function of an Executor, as peculiar to the same. (3) To these doubtful acts, are opposed all such acts, as from whence the Law will infer or presume, either necessarily or very probably, an Administration; and which are either by way of Acquisition, or Translation, or Possession, all which are principal acts; for the Law doth distinguish between acts *principal*, and such as are but merely *preparatory*, either to the

Vid. Noy. 69.

Hugh's Abridgm.

ibid. tit. Execut.

(1) Styles Regist.

120. Clayt. Rep.

Case 12.

(2) Mantic. 1. 12.

tit. 9. nu. 3. &

Matchard. de

Probat. Concl.

40.

(3) Mantic. ubi

supra. nu. 16.

the Administration it self, or preparatory only to a Legal Requisition of the same; which preparatory acts are necessarily so, or not. And under these Heads may be comprized, whatever the Law determines touching an Executor of his own wrong; as, Whether he hath Administred as Executor or not. Now the acts which the Law calls doubtful, and not amounting to an Administration, are such as these. *viz.* A providing of Sustenance for the deceased's Family, specially the Children thereof; feeding and preserving his Cattel, repairing his Houses going to decay; acts of Piety and Charity, taking care for his Funeral, whether with his own or the deceased's money; (4) Paying the Physicians fees, preserving his Corn from rotting in the ground: (5) But this is much opposed, because it denotes a Possession; and therefore in that case the Law requires, That it be done under a Protellation, That he doth it only *rei servandæ causæ*. (6) But if he convert such Corn or other Fruits of the deceased to his own use, then (as agreed by all) it is an Administration. (7) And such acts as from whence the Law doth necessarily, or very probably infer an Administration, are these *viz.* The requiring of any Debt due to the deceased, or suing his Debtors for the same; (8) converting the Goods of the deceased to his own use, paying any Debts owing by the deceased with his money, paying or delivering any Legacies bequeathed by the deceased, (9) though to pious uses; (10) giving, selling or alienating any of the deceased's Goods, saving only such as *servando servari non possint*; (11) Or were hypothecated and pledg'd unto himself. (12) And as to possessory acts, or such as whereby the party claims and keeps possession of the deceased's Goods, or any part thereof, the Law presumes that also to be an Administration, (13) saving in the Case of Joynt-Tenancy, where he may justify his possession by Survivorship; (14) or unless he claims it in his own proper right in some other way distinct from, and paramount to the deceased's title; (15) or unless he in possession were (during such his possession) ignorant of the deceased's death. So that by these premises it is evident, That all acts of Acquisition, of Translation, and of Possession, do regularly imply an Administration. All which premises do refer to principal acts. But as to the acts necessarily preparative to an Administration; as, when a Conditional Executor fulfils that Potestatives Condition under which he was so constituted, (16) or the entering of a Caveat, or the opposing of the Probate, or endeavouring to vacate the Will: None of these are held in Law as an Administration or Acceptance of Executorship: For in truth all these acts are not in a proper sense, any acts necessarily preparative to an Administration, but do only make way for it, and may be in order thereunto. Much less shall

acts

(4) Didac. Spino. in Spec. Testa. de adit. hered. n. 41
Maschard. Concl. 44. nu. 20, 21
Menoch. l. 4. Præf. Præf. 101. Mant. l. 12. tit. 10. nu. 9. & tit. 9. nu. 8. & Charondas Obser. in verb. *Heritier*.
(5) Menoch. & Masch. ubi sup. nu. 16. Bartol. in l. gerit. nu. 24. de Adq. hered.
(6) Fachin. Contravers. l. 6. c. 52
(7) Masch. ibid. nu. 33. Mant. l. 12. tit. 12. nu. 5.
(8) Mant. & Masch. ibid. n. 5. Menoch. ubi sup. nu. 18.
(9) Meno. ib. nu. 25
(10) Mant. ib. nu. 12.
(11) Mant. ib. nu. 5. 6. Masch. ubi supra.
(12) Menoch. ubi supra.
(13) Mant. ib. tit. 12. nu. 8. Masch. Concl. 45.
(14) Masch. Concl. 44. nu. 27. Menoch. ubi sup. Mant. l. 12. tit. 9. nu. 17.
(15) Masch. Concl. 4. 5. nu. 59.
(16) Galganet. de Condit. par. 2. c. 1. g. 52. Mant. l. 12. tit. 9. nu. 7.

acts not necessary to an Administration, charge the party as Executor of his own wrong; and therefore a taking account of the deceased's Estate, an examining of his Books of Account, the making an Inventory, and the like, do not amount to an Administration; but rather imply a Deliberation, whether it be expedient for him to Administer, than justify any Inference thence that he hath administered, or determined his Election as to the Executorship. (17) Nor finally, shall he that is appointed Executor in the Will, if he refuse the Executorship, be said to have accepted the same, or to have administered to the Will, albeit that he received a sum of money for such his Refusal or Renunciation thereof. (18.)

(17) Menoch. de
Præf. l. 4. Præf.
101. nu. 81.

(18) Mantie l. 12.
tit. 12. nu. 17.

C H A P. IX.

Of a Child in the Womb made Executor, an Infant-Executor; as also of an Executor and Administrator *durante Minoritate*.

Vid. Dyer. fol.
303, 304.
Coke, 6. 67.

1. *Whether the Child in the Womb may be made Execueor.*
2. *At what age an Infant-Executor may Administer.*
3. *What acts may, or may not be done by an Infant-Executor.*
4. *To whom the Right of Administration doth belong durante Minoritate.*
5. *Divers Cases reported in the Law, pertinent to this subject.*

(1) L. placer.
ff. de Liber. &
Posthum.
(a) Jaf. in l. pla-
cer. ff. de Liber.
& Posthum. &
Mantic. de Con-
ject. ult. vol. lib.
4. tit. 8. nu. 4.
(b) Paul. de Cast.
in L. qui filiabus.
§. 1. ff. de Legib.
(c) Brok. Abrid.
tit. Exec. nu. 115.
& tit. Coverture.
nu. 56.
(d) Coke. Rep.
lib. 5. in Prince's
Case.

1. **T**HE Child in the Womb, and unborn at the Testators death, may be made Executor; (1) inasmuch, that when such is so appointed, if the Mother bring forth two or three Children at that one Burthen, they are all to be admitted Executors. (a) The Law is also the same as to a Legacy given in like manner, which is to be equally divided amongst them. (b)
2. Though an Infant, how young soever he be, may be Executor, (c) or unborn as aforesaid; yet the Execution of the Will shall not be committed to him, until he attain the age of Seventeen Years, for Administration granted *durante Minoritate* ceases, when the Infant-Executor attains to that age of Seventeen Years, and not at Fourteen, as in Prince's Case. (d) And if it be a Female-Infant, and married to a man of Seventeen years of age or more, it is then as if her self were of that age, and her Husband shall have the Execution of the Will, and Administration thereof. (e) This

(e) This Limitation of Seventeen years comes in by the Canon, (e) *Office of Exec.* not by the Common Law. In which Law it is reported, That cap. 18. 18. if an Infant be made Executor, Administration during the Minority of the Infant, may be committed to the Mother, and the same shall cease and be void when the Infant is of the age of Fourteen years; and such Administratrix cannot sell the Goods of the Testator, unless it be for necessary payment of Debts, because she hath the Office of Administratrix only *pro bono & commodo* of the Infant, and not to its prejudice. (1)

(1) Co. 5. par. 20
Prince's Case, as in
Hugh's Abridgm.
verb. Administr.

3. Although an Administration granted *durante Minoritate*, doth as aforesaid, cease when the Infant Executor doth attain to the age of Seventeen years, yet betwixt that age and the age of Twenty one Years, such Executor cannot assent to Legacies; (f) (f) Coke ubi sup. howbeit, upon satisfaction really made, he may release a Debt due to Testator; (g) for although his actings unconformable to the Duty and Office of an Executor bind him not, yet such acts as are conformable to such an Office done by him during his Minority (that is, till he be of the age of Twenty one Years, for till then the Common Law holds him a Minor) are binding and good in Law. (h) And therefore an Infant-Executor may make a good Release, upon true and real satisfaction made, but not otherwise. (h) Coke *ibid.* *Ruffell's Case*.

(g) Brook ubi
supra & Coke
Rep. lib. 5. in
Ruffell's Case.

(2) Also the sale of the Testators Goods by an *Infant-Executor*, with the help of the Overseer of the Will, may be good: (3) By whose help he may also, in certain Cases, pay Debts owing by the Testator. (4) Yea an Infant-Executor, after Seventeen years of age, may sell any of the *Chattels personal* he hath as an Executor, but not a Lease for Years, till his age of One and twenty years. (5) (5) Per Just Hat-

(2) Pasch. 14 Jac.
B. R. *Payne* verf.
Chute Rol. Rep.
(3) Cro. 1. 254.
(4) *Ibid.* Clerk
verf. *Hopkins*.

4. Until the said age of Seventeen Years, the Administration is to be committed to some other; as, to the Father, or to the Guardian, or Tutor of the Child; (i) who during such Minority, cannot sell or alienate, save in cases of necessity, nor set a Lease for a longer term than the Executors Minority. (k) And where an Infant is made Executor, and Administration granted to another

(i) *Office. Exec.*
ubi supra.
(k) Coke ubi
supra. in *Prince's*
Case.

durante Minoritate, if that Administrator bring an Action of Debt for money due to the Testator, and hath the Defendant in Execution, and the Infant then come of age: In that Case it was held, That although the authority of the Administrator was determined, yet the Recovery and the Judgment did remain. (1) (1) Godb. 104. And when in that case it was moved, That the Defendant might be discharged out of the Execution, in regard, that by reason of the Executors being come of full age, the authority of the Administrator was determined, and he cannot acknowledge satisfaction: It was said, That he was rather a Bailiff to the Infant, than an Administrator; and the Opinion of the Court was as aforesaid. (2)

(2) Mich. 29 Eliz.
C. B. Godb. 104.

Hill. 21 Eliz. B. R.
Russel & Pratt's
Case. Anderf. Rep.
 Case. 212.

5. *E. R.* Executor of *W. R.* brought his Action on the Case against *T. P.* supposing that divers of the Testators Goods came to the Defendants hands, &c. In which Action the Defendant pleaded a Release from the Plaintiff: Whereupon was replied, That the Plaintiff was within age at the time when he gave such Release, and whether such Release was a bar upon a Demur in *B. R.* was the Question? where it was adjudged, that it was a void Release. The matter was after removed, and brought before Justices in the Exchequer Chamber by a Writ of Error; where all the Justices of the Common Pleas, and the Barons of the Exchequer held, That the Judgment in that point was good, and that it was no Error: For they said, that an Infant-Executor cannot Acquit, Release, or Discharge a Bond, without receiving the money due thereupon; otherwise he might through his own folly or ignorance, charge himself of his own proper Goods, which is not allowable in an Infant to do by a Release or Acquittance without some other Act; but if upon a single Bond or Obligation he receive the money, and make an Acquittance or Release, they held that was good, and the Infant should be bound thereby; but by other means the Obligation could not be discharged: And they all held That when a single Obligation is made to an Infant, and he during his Infancy receive the money, and make an Acquittance, he shall be bound thereby. For an Infant Executor may make a good Release, upon true and real satisfaction made him, but not without real satisfaction. (3)

(3) Pasf. 14 Jac. B. R.
Proffer. vers.
Mallorie Rel. Rep.

Upon an Assignment of Bonds to the Queen, a *Sicre facias* was brought against an Infant; who pleaded, That Administration of the goods was granted to two other persons during his Minority. And it was held by the Court, That the same was no Plea: By which Case the Court conceived, That the Administrator *durante Minori etate*, had not any power of, or interest in the Estate. (4)

(4) Hill. 33 Eliz.
 in the Exchequer.
Miller & Gores Case
 Godbold. 104.
 Trim. 6. Jac. B. R.
Croft & Wal-
bank's Case. Yelv.
 Rep.

Action is brought against the Defendant as Administrator of *J. S.* during the Minority of *D.* Issue joyn'd, and found for the Plaintiff. It was alledg'd in Arrest of Judgment, That the Declaration was not good, because *non constat*, whether *D.* were Seventeen years of age at the time of the Action commenced, at which time the Defendant-Administrators authority is determined; But it was adjudged, That the Plaintiff is not to shew or set forth that matter: 1. Because the Plaintiff is a stranger to the Defendant's power 2. Because the Defendant by joyning issue, hath admitted that his power continues.

Trim 6 Jac. B. R.
Smith & Smith's
Case. Yelv. Rep.

Bis makes *Katherine* his Wife, and *John* his Son (aged one year) his Executors, *K.* proves the Will alone, and marries the Plaintiff, and they (without the Son) bring Action of Debt as Executors against the Defendant, who pleaded in abatement of the

the Writ, that *John* was made Executor with *Katherine*, and that he was yet alive, not named, &c. The Plaintiff replied, That *John* was not above one year of age, that *Katherine* had proved the Will, and had Administration committed to her during his Minority, &c. Whereupon *Relv.* demurr'd, and adjudg'd for the Defendant, *quod Billa cassetur*, for that in truth they are both Executors, and ought to be named in the Action; and albeit that *Katherine* by the Administration committed to her *durante Minori etate* hath the full power, yet the Infant ought to be named, for that she hath affirmed him to be an Executor.

Debt as Administrator to *A. L. durante Minori etate W. L.* the Executor, upon an Obligation, and avers, that *W. L.* was within the age of Twenty one years. The Defendant pleaded an ill Bar, and it was thereupon demurr'd; but because the Court was resolved (upon Conference with divers Civilians openly in Court) That the power of an Administrator *durante Minori etate*, doth cease at the Executors age of Seventeen years, and that Administration committed after that age of the Executor is merely void, and notwithstanding this averment here, the Executor might be above the age of Seventeen years, and within the age of Twenty one years: It was therefore adjudged, *Quod querens nihil caperet*, &c. 5. Co. 29. And albeit a Woman Covert being Executrix, may not without her Husbands Consent, make a Release or Acquittance of her Testators Debt, or sell his Goods, or give or distribute the same; (1) yet an Infant-Executor may, (2) provided that true and just payment and satisfaction be made him for the same, otherwise not. (3)

Trespas upon a special Verdict: The Case was, *Jackson* Lessee for years by several Leases of divers Lands, some of them in the Diocese of *York*, some in another Peculiar in the same Diocese, devised all these Leases to his Son, and made his Daughter within age his Executrix: The Mother takes Administration *durante Minori etate* of the Executrix in *F.* the Peculiar where the Testator died, *ad Commodum & proficuum Executricis*; the Administratrix granted this Term, *durante Minori etate* of the Executrix, to the Plaintiff: Whether the Grant were good or not, was the principal Question? The Court resolved, That it was not good; for such an Administrator hath but a special property *ad proficuum Executoris*, but not a general property as another Executor or Administrator hath; and therefore his sale of Goods, unless they be *Bona peritura*, or it be for necessity for the payment of Debts, which he is chargeable to pay, it shall not bind; But he may sue and sued, and be yet his authority is but a limited authority; and therefore like as if Letters *ad Colligendum bona Defuncti* were granted to one, there he may sell *bona Peritura*, as Fruit, or the like.

Hill. 40 Eliz. C.B.
Pigot vers. Gascorn, Cro Rep. par. 3.

(1) 21 Ed. 4. fo. 41
(2) Broo. Abridg. tit. Exec. nu. 115.
tit. Coverture. nu. 56.
(3) Co. Rep. l. 5. *Russell's Case*
Hill. 41 Eliz.
Price vers. Simpson
Cro. Rep. par. 3.

Whether Admini-
stratrix durante-
Minoritate,
may assent to a De-
vise of a Term.

like. 2. It was moved, Whether the assent of an Administrator, *durante minori ætate*, to the Devise of a Term, or the assent of the Executor himself (during his Minority) to such a Devise be good? *Anderson* said, That an Executor at the age of Eighteen years may assent; but whether the assent by such an Administrator be good or not, they doubted. 3. It was moved, Whether Administration should in this case be granted at two places, *viz.* The one within the Peculiar, the other by the Archbishop of *York*, Ordinary of the Diocese? or, Whether he should have the Prerogative in both, as he had where *Bona Notabilia* were in divers Diocesses. And it was resolved, That there should be two Letters of Administration granted; for the Archbishop shall not have any Prerogative here, because this Peculiar was first derived out of his Jurisdiction; wherefore, &c. 5 Co. 29.

Trin. 38 Eliz. C.
B. Bade vers.
Starkey Cro. Rep.
p. 3. Pl. 7.

Error of a Judgment in Debt in C. B. The Error assigned was, because the Plaintiff sues by an Attorney, where he was an Infant, and ought to sue by Guardian: But because the Action was brought by him as Administrator, so that he sued in *auter droit*, Infancy is no impediment unto him, no more than Outlawry, and therefore he might well sue by Attorney; and it was thereupon adjudged for the Defendant, that the first Judgment should be affirmed. Note, that if an Infant sue, and not as Executor, he must then sue by his Guardian: *vid.* Case *Bartholomew* vers. *Dighton*, Hill. 37 Eliz. B. R. in Cro. Rep. part. 1. Pl. 22.

A. was bounden to pay 100*l.* to B. his Heirs, Executors or Assigns: B. the Obligee made an Infant his Executor, and died; Administration of the Goods of B. was committed to another during the Minority of the Infant; and the Obligor paid the 100*l.* to the Administrator. It was a Quere, 28 Eliz. C. B. as *Rhodes* Justice said, Whether the same were a sufficient payment to excuse him, or not? But the better Opinion was, That it was: But it was not then resolved. (1)

(1) Hugh. Abrid.
verb. Administ.

In an Accompt brought by an Administrator *durante minori ætate*, against the Defendant as Bailiff of such a Mannor: It was found for the Plaintiff. It was moved in stay of Judgment, That it is not shewed, that the Executor the Infant was within the age of Seventeen years; and it might be, he was above the age of Seventeen years, and yet under age. But the Opinion of the Court was, That it shall not be so intended, unless it be shewed, that he was above Seventeen years, especially when the Defendant had admitted him to bring the Action, and had pleaded to Issue. (2)

(2) Mich. 7. Car.
B. R. Wells &
Somers Case. Cro. 1.
par. 174. vid.
Mich. 9. Car. Rot.
373. Dorchester
and Wells Case.
Cro. 1. par. 271.
Pasch. 40 Eliz.
Knot & Knot Exe-
cutors of Knots,
vers. Barlow. Cro.
Rep. par. 3. Pl.
27.

Debt upon an Obligation made to the Testator. The Defendant pleaded a Release made by one of the Plaintiffs. The Plaintiff replies, That this Release was made without any Consideration, and he who released was within age at the time of the Release made; and

and it was thereupon demurred, and adjudged for the Plaintiff, that it was a void Release, being by an Infant without Consideration. Touching a Release made by an Infant-Executor, remarkable is that Case wherein Action of Debt was brought by Executors against an Executor, upon a Bond of 100 *l.* made by the Testator for the payment of 52 *l.* wherein the Defendant pleaded that he had paid the 52 *l.* to *A.* one of the Executors, in satisfaction of the said Debt, and all interest and damages for it; and thereupon *A.* released him the said Obligation. The Plaintiff replied, That *A.* was within age at the time of the Release, *viz.* of the age of Eighteen years. It was objected, That this Release of an Infant of Eighteen years was good, he being of age sufficient to take upon him the Executorship, and none can deny but that there was payment of the principal money; and that it should not be a *Devastavit*, because he did that which he was compellable to do in the Court of Conscience: But the Opinion of the Court was, That this Release of an Infant was not any bar, because the Infant being Executor by course of Law, is to have the benefit of the forfeiture of the Bond; and when the Infant, being but one of the Executors, takes part of the money only, yet this Release shall not bar him: But if he will take all the money, and make a Release, it is good. And this Case afterwards being moved at Serjeants Inn, *Dampart* and *Denham* Barons agreed, That this Release, without payment of the entire sum contained in the Bond (it being forfeited) was not any bar to the Infant: It was (3) Trin. 13 Car then agreed, That such a Release by an Executor of full age, upon B. R. *Kilvertton & Latham's Case.* on the receipt of the principal money and interest, shall be only Cro. 1. par. 352, 353. Assets, and shall not be a *Devastavit* for the residue. (3)

In the Case between *A.* and *M.* as Administratrix of *J.* during Mich. 17 Jac. B. the Minority of *L.* It was among other things objected, That the R. *Walsh* verfi. the Plaintiffs Declaration was not good, because it was brought against her as Administratrix *durante Minori etate* of one *L.* And Aldrich. Cro. Rep. par. 2. Pl. 12. vid. Rep. at large. And it is not averr'd, that the said *L.* was yet within the age of Seventeen years, *sed non allocatur*; for true it is, that if one bring an Action, and entitles himself as Administrator *durante minori etate* of one such, he ought to shew that he is yet within the age of Seventeen years, as Co. 5. fol. 59. *Pigot's Case*. For that he is to take Conuzance how long his authority shall continue, and he ought to shew it, to enable himself to the Action: But when he brings the Action against one as Administrator *durante minori etate*, there such Plea need not be shewn, for so long as the other continues his meddling, he shall be sued, and the Plaintiffs need not take Conuzance of the age of the other; as, &c. And here if her authority were determined, it should be shewn on the Defendants parts; therefore the Judgment was affirmed. So that if the Administrator *du-*

(4) Hob. 251.
Hill. 26. Eliz. B.
R. *Ruffel's Case*.
Co. 5. par. Case
27 vid ibid. 28.

ante Minori etate be Plaintiff, the non-age of the Executor is to be averred; *Secus*, if he be Defendant. (4)

Note, it was resolved by all the Justices of England, That the Release of a Debt or a Duty by an Infant Executor, after Probate made of the Will, is not good; because it should be a *Devastavit* and charge the Infant of his own Goods; and also it should be a wrong, which an Infant by his Release cannot do; and also because it is not pursuant to the Office of an Executor.

Hill. 39 Eliz. Ford
vers. *Glanville*.
Moo. Rep. nu. 648.

Infant Executor: Administration was committed *durante Minori etate*; Debt was brought against the Administrator, and then the Infant came of full age; and the Justices very much doubted whether the Action did abate.

Tren. 14. Jac. B.R.
White, vers. *Hall*.
Moo. Rep. nu.
1163.

A Guardian recovered a Debt on an Obligation made to an Infant, the Defendant paid the Principal and Costs, and prayed that the Guardian might be ordered to acknowledge satisfaction. The Court said, That a Guardian, or an Infant, or Executor, may not acknowledge satisfaction for more than they receive, and for so much they ordered the Guardian to acknowledge satisfaction: And made an Order, that no Execution should issue for the residue.

Mich. 10 Jac. B.
per Curiam. Rol.
Abridg. tit. Exe-
cutor. lit. M.

If an Administration be repealed from one, and granted to another, which was only *durante Minori etate*, and that other bring the first Administrator to account, and after give him a Release, yet the Infant at his full age may compel the first Administrator to account to him again, and the former account to such second Administrator shall not bar him, for such Administrator's Release is not good, unless for some such cause as for which it ought to be made.

Hill. 26 Eliz. An-
ders. Rep. Caf.
164. vid. 16 H. 7.
fol. 5, 6.

It was by the Chief Justice of the *Queen's Bench* demanded of the other Justices there assembled upon hearing of Causes, If one make an Infant his Executor, that releases a Debt due to him as Executor, without receiving the sum (which Receipt, if it be good, will be a *Devastavit* by the Infant of the Goods in his hands) whether such Release shall bind the Infant or not? It was agreed by them all, That such Release is void; for an Infant by his own Laches and Folly shall not prejudice himself. Yet a *Feme Covert* Executrix may receive money (without her Husband) which was due to her Testator, and give an Acquittance for the same; and if she give an Acquittance for Debt which causes a *Devastavit*, the Release shall be good, and the Wife and Husband bound thereby; the reason is for that the Wives Administring without her Husbands consent, is and shall be accounted the Husband's Folly; but an Infant's Folly shall not be reckoned to his prejudice: But if one be in Debt to the Testator upon a simple Bond or Obligation, and the Infant Executor receive the Money, and give Acquittance;

tance; in that Case that Acquittance is good^{*}, because there is a necessity for it; for otherwise the Obligor is not bound to pay the same, and in that Case there is no folly in him.

One makes an Infant his Executor, and dies; the Ordinary grants Administration to a stranger during the Infant's Minority; after when the Infant came of full age, he proved the Will. Now the Question was, What remedy the Infant should have against the Administrator for the Goods, *viz.* Whether an Action of Accompt, or a Writ of *Detinuit*, or to take his Action against the Ordinary himself, to deliver him the Goods? The Opinion of the Justices of the Bench was, That he could not have an Action of Account, but a *Detinue*, or might sue in the Ecclesiastical Court for the Goods. --- 36 H. 8. C. B. *Anderson. Rep. Cas.* 86.

An Infant-Executor must appear by his Guardian, it is not sufficient for him to appear by an Attorney. (1)

(1) Pasch. 14. Jac.
B. R. *Westcot &*
Cottle. Rol. Rep.

C H A P. X.

Of a Woman, under Coverture, made Executrix, or making Executors.

1. *Whether the Husband may fix an Executrixship, on his Wife without or against her consent.*
2. *Whether she may assume or accept the Executrixship, without or against his consent?*
3. *The difference between the Common and the Canon, or Spiritual Law in this point.*
4. *How the Wife may be said to be an Executrix, without her Husband's consent.*
5. *In what Case a Wife may make an Executor, without her Husband's consent.*
6. *In what Case she may make her own Husband, or any other her Executor.*
7. *Cases and Considerations in Law relating to this Subject.*

1. IF the Husband of a Woman appointed Executrix in a Will would have his Wife to take upon her the Execution of the Will, to which she will not assent, but refuse the Executrixship, when her Husband would have her take the Execution thereof: In this Case the Executrixship is not to be fastned on her against her will; (a) but Administration is to be granted to the next of Kin, as in case of Intestation. But if the Husband, though the Will be not proved, doth Administer as in the Wifes right, though

(a) Panor. in c. Jo-
de Test. extr. nu. 3.
& Olden. de Exe-
cut. ult. vol. tit.
7. in fine & alii.

(b) Offic. Exec. c. 17. though against her mind and will, she will hereby be so bound and concluded, as that during his Life she may not decline or avoid the Executrixship: (b) But not so after his death, for then she may in this Case refuse. (c)

(c) Eliz. Dyer. 166. B. where is cited, 3 H. Rot. 112.

2. As a Wife named or appointed Executrix in a Will, may not be compelled unto the Execution thereof, without her own and her Husbands consent: So neither shall she assume or accept such Executrixship, without her Husbands consent and approbation, because it is in his power to oppose and hinder it. (1)

(1) Offic. Exec. ubi supra.

3. That the Wife appointed Executrix in a Will, may neither assume nor be compelled to the Executrixship, without her Husbands consent is true Doctrine only at the Common Law; (d) for by the Canon or Spiritual Law, which doth not, like our Common Law, distinguish between Women married and unmarried in such matters, it is otherwise. (e) For there the Wife may sue or be sued apart and alone, without her Husband; and therefore in that Court the Husbands dissent, denial, or refusal would be of small force to hinder the committing of the Executrixship to the Wife, she not refusing. But by the Law of England the Wife is so under the Husbands power, (f) that she is not capable of contradicting in pleading or doing other acts; inasmuch, that she could not take Lands nor Goods by Gift or Conveyance without her Husbands assent. (g) And therefore the Husband may express his dissent as to his Wives proving the Will wherein she is made Executrix.

(d) Bryan Chief Just. 2 H. 7. 15.

(e) 2 H. 7. 15. b.

(f) 33 H. 6. 31. 43. 39 Ed. 3. 1.

(g) 27 H. 3. 24.

(h) Brook. tit. Execut. 147.

4. If a Woman Sole be made an Executrix, and she marry before she intermeddle with the Estate, and then her Husband doth Administer; this is such an acceptance as will bind her, and she can never afterwards refuse it. (b) Likewise, if once the Wife Administer, though without the Husbands privity and assent, and though no Will proved, this will go far to exclude them both for ever after from pleading, That she neither was Executrix, nor Administered as Executrix. The Law is the same, if once the Will be proved, and the Execution thereof committed to the Wife, though against her Husbands mind and consent.

(i) Fitzh. Abrid. tit. Execut. nu. 20. & Brook. eod. tit. nu. 11. &

Perk. tit. Devise, cap. 8. fol. 97.

(k) Brook. ibid. & Apolog. for proceed. in Courts Ecclesiastical, part. 1. c. 3. p. 22. in fin

(l) Plowd. in cas. inter Bransby & Grantham f. 525.

5. A Wife or a Woman Covert, being Executrix to another, and in that right having Goods moveable, may thereof make her Testament, and without her Husbands consent; (i) because she hath not such Goods merely to her own use, but as representing the person of another; and therefore such Goods as she so hath as Executrix, are not her Husbands, but are to be disposed of for the use of the Testator. And not only so, but of these Goods she may make her Husband her Executor, (k) or any other person without his License; unless instead of making an Executor thereof, she bequeath the Goods whereof she is Executrix, by Devise or Legacy; (l) for even with her Husbands consent she cannot bequeath

bequeath such Goods; or unless she is not only Executrix but Legatary also, and hath accepted of the things bequeathed not as Executrix, but as Legatary, for thereby they are invested in her Husband, (m) for which reason they cannot be given from him without his Licence and Consent. (n) Thus also for the continuation of this Executorship, the Wife may make her Executors and her Will as touching such Goods, Debts, or Credits, without her Husbands consent, to whom no Benefit could redound by the Administration of these Goods which his Wife hath in right of another; for those Goods would go and be to the next of Kin to the Testator, taking Administration *de bonis non Administratis*, in case the Wife should die Intestate. (o) And therefore her Husband not being capable of advantage by such Goods, cannot be thereby prejudiced. And so it is but Reason that the Wife should appoint her Executors of such Goods, and continue the Executorship thereof, according to the mind of the first Testator, without the licence or necessary consent of her Husband; which consent indeed as touching all Goods and Chattels which the Wife had before Marriage, or since in her own right, must be first had and obtained; otherwise her appointing of Executors as to them, will be invalid and of no force. So likewise by his assent, she may make Executors of an Obligation or things in Action, and may make her Husband her Executor, as appears by the Books. (1)

6. A Woman (by the Common Law) may make her Husband Executor of such things whereof she was Executrix to another before, or of a duty due unto her before Coverture, or of a Rent being behind upon a Lease made unto her for term of life, or of other Lease, or of any thing whereof the possession must be obtained by Action: But she cannot make him Executor of that which she hath in her Possession, as in her own right. (p)

7. Husbands, and their Executors and Administrators, have the same Remedy for the Rents due unto their Wives not paid in their Wives life-time, as Executors and Administrators of Tenants in Fee, in Tail, or for Life, have for Rent-charge, Rent-service, or Fee-Farms; who may have an Action of Debt for the arrearages thereof, against the Tenants of the said Lands, due by them to the Testator at the time of his death, and may distrain for the same upon the Lands that were charged therewith. (1)

Action of Debt by a Woman as Executrix to her Husband: The Defendant pleaded, That *A. B.* her Husband in his life-time and he, did put themselves in Arbitrament, &c. of all Actions, &c. who did Arbitrate, that the Defendant should do, &c. in discharge of Debt, and which he hath performed, &c. and after her Husband died. Adjudged *per Curiam*, That the Debt was extinct by the Arbitrament. But if the second Husband do make no

(m) Tract. de Rep. Angl. lib. 3. cap. 6.
(n) L. id. quod nostrum ff. de Reg. jur.

(o) Plowd. in Cas. inter Grettisbrook & Fox.
A Woman Covert Executrix may consent to a Legacy. If there be two Executors, whereof one a Legatee, he may consent to his own Legacy, and take it without the others assent.

11 H. 4. 84. Roll. Abr. tit. Devise.
(1) 4 H. 6. 31.
39 H. 6. 27.
3 Ed. 3. Devise
12. 26 Ed. 3. 71.
(p) T. 12 H. 7. fol. 27. Apol. of proceed. in Courts Ecclesiastical, c. 3. par. 1. pag. 22.

(1) Stat. 32. H. 8. cap. 37.

act in the time of his life, the Debt remaineth to the Wife, being Executrix to her first Husband : But if the second Husband doth give away the Goods which his Wife hath as Executrix to her former Husband, the Gift is good ; and by this Arbitrament all Actions which she had joyntly against the Defendant and a stranger, are gone. (2)

(2) Per Cur. 21
H. 7. fo. 29.

Touching Husband and Wife in reference to this subject, considered as well either *Actively* or *Passively*, as *Judicially* or *Extra-judicially*, the Laws Common and Civil have their Conceptions as different as their Appellations. *Baron* and *Feme* are but as one person regularly in the one *Vir* and *Uxor*, otherwise in the other ; Consider it therefore as under the former notion, practicable with us : And what was anciently held, *viz.* That a Woman Covert made Executrix, might have the Office contrary to her Husband's consent, (3) may seem to border nigher on a Paradox in Law, than on any Reason of Law, which indeed is but *Ratio regulata*, or Reason put into Rule : For if she should be admitted to Administer to the Will, her Husband dissenting, the Consequence would be, That himself in effect should be Executor contrary to his own consent ; and she that by the Law is *under* his power, should in Fact be *above* his Will, The Law therefore hath otherwise provided, whereby the Will of the living Husband shall in this case prevail with his own Wife, before the *Will* of a dead Testator. (4) But if the Wife, contrary to the Husbands mind, will refuse the Executorship, it is supposed the Husband may Administer and prove the Will for her : (5) Or in case of *non Probat*, he Administer in her right against her mind, she may be concluded thereby during his life, but not after. (6) But she cannot be an Executrix without her Husband's consent ; nor being so, may do any act that may be a *Devastavit* of the Goods without him. (7)

(3) 13 Ed. 1. Fitzh.
Exec. 119.

(4) 2 H. 7. 15.

(5) 33 H. 6. 31.

(6) Off. Exec. cap.
17. sec. 1.

quoting Dyer. ci-
ting as resolved.

(7) Co. 5. 27.

33 H. 6. 44.

C H A P. XI.

Of Debtors or Creditors made Executors or Administrators.

1. *How the making a Debtor Executor, becomes a Release of the Debt; exemplified by some Cases in the Law.*
2. *In what Cases this holds true, where there are Joynt-executors appointed.*
3. *Under what Limitation a Creditor-Executor hath precedency of other Creditors, in paying himself first.*
4. *Law-Cases relating to this subject.*

IF an Executor prove the Will, and be indebted to the Testator, the Debt is extinct in Law; (a) yea, though the Executor died before he did ever Administer or prove the Will; (b) for the Debt is released in Law, by making the Debtor Executor, though he never Administer. (c) There is the like Extinction of the Debt if the Creditor marry with one of the Executors of the Debtor: (d) But if the Debtor take Administration of the Goods of the Creditor, this ought not to discharge him of his Debt, but it ought to be as Assets in his own hands, for that the Intestate did no act to discharge him from the Debt. Also if the Obligee make the Obligor his Executor, this is a Release in Law of the Action, but the Duty remains, for the which they retain so much Goods of the Testator. (e) Likewise, if an Infant of the age of Seventeen years release a Debt, this is void: But if the Infant make the Debtor his Executor, this is a good Release in Law of the Action. (f) But if a Feme-executrix take the Debtor to Husband, this is no Release in Law; for that is injurious to the deceased, and in Law works a *Devastavit*. (g) But if the Testator make the Wife of one indebted to him his Executrix, it is a Release in Law, as if she her self were the Debtor; but if after the Testator's death she do marry with such a Debtor, then it is a Devastation. (h) Also if A. and B. be made Executors, the Testator being indebted to A. Ten pound, and B. being indebted to the Testator Ten pound; in this Case the Debt of B. to the Testator stands in Law extinct. (i) And as it is thus at the Common Law, so also by the Civil Law when the Creditor maketh the Debtor his Executor, by such Executorship the Debt is confounded, and that because of impossibility in Law, forasmuch as the Executor cannot bring an Action of Debt against himself, being one and the same person; the Obligation therefore is by secret act of Law dis-

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annulled.

(a) 21 Ed. 4. 3. 61.
Plowd. Com. 36.
(b) Plowd. Com.
185.
(c) 21 E. 4. 3. &
11 H. 6. 38.
(d) 11 H. 4. f.
83, 84.

(e) 8. E. 4. 3. &
21 E. 4. 2. Coke
Com. ex Littl. In-
stit. part. 1. l. 3. c.
8. Sect. 445. in
med.
(f) Coke ibid
(g) Ibid. & Mich.
30, & 31 Eliz.
(h) Offic. Exec.
17, Sec. 1.

(i) Ibid. cap. 2. &
21 H. 7. 31 Plowd
Com. 185. contra
Danby & Choke 8
E. 4. 3.

(1) Phil. Dec. 2d
Reg. jur.

(1) Mich. 30, &
21 Eliz. B. R.
Croftman & Read's
Case. Leon. fa. 320.
Case. 468.

(1) *Law Cases Col-*
lect Edit. 1641.
perused per *Hutton*.

(3) Per Cur. 23
Ed. 4. fo. 17.

(1) Flowd. ubi
supra. & 2 R. 3.
20. per *Starkey* &
22 per *Vavafor*.
(m) Ibid 9 H 5. 13.
(n) Fulbec. Paral-
lels. lib. 1. Dialog.
7. fo. 44 & 11 H 4.
pp. 31 & 21 E. 4.
8. r.

annulled. (k) But if a Creditor make his Debtor and a stranger his Executors, and the Debtor dieth, the surviving Executor may have an Action of Debt against the Executor or Administrator of the Debtor: As was agreed by the Court in *Croftman* and *Read's* Case. (1) Where the Case was this, *A. B.* made his Wife Executrix, and died, *C. D.* being then indebted to the Testator in 60 *l.* upon a simple Contract, the Wife Executrix took to Husband the said *C. D.* who made his Executor and died. *A.* Creditor of *A. B.* brought an Action of Debt against the Wife Executrix of *A. B.* And upon the pleading, the matter in Question was, If by the enter-marriage of the Wife with the Debtor of the Testator, the same was a *Devastavit* or not? and, If the said Debt of 60 *l.* due by *C. D.* should be Affets in her hands? And *per Curiam*, it is no *Devastavit*, nor Affets, as is supposed; for the woman may have an Action against the Executor of *C. D.* And it was agreed by the Court, That if a man make his Debtor and a stranger his Executors, and the Debtor dieth, the surviving Executor may have an Action of Debt against the Executor of the Debtor: And so it was adjudged in the principal Case, somewhat contrary whereunto is that which is elsewhere asserted for Law, (2) That if *J. S.* and *F. G.* be indebted unto a man in 100 *l.* and he maketh *J. S.* and another his Executors, and dieth, and *J. S.* maketh his Executors, and dieth, *F. G.* the Co-executor with *J. S.* which survives him, cannot have an Action against the Executors of *J. S.* for this 100 *l.* for the Action was extinct before; for the Action could not be used before, but in the name of *J. S.* and *F. G.* his Co-executor, which were first, although the one of them did not Administer. But if *A* doth owe and be indebted to *B.* 100 *l.* and maketh *B.* and *C.* his Executors, and die; if *B.* do not Administer, he may have his Action for the 100 *l.* and so may his Executors, if he dies: For in this Case the Action of *B.* is not extinct (he not Administering to the Goods) although he made him one of his Executors. (3)

2. So also it is if any one of the Joynt-Debtors by made Executor, or any one of the Joynt-Executors be a Debtor to the Testator, for that they cannot sue, without making him who is a Debtor also a Plaintiff, which he is not capable of against himself. (l) The Law is also the same for Actions either of Trespass or Account. (m) So that if two persons be joyntly bound to the Testator in One hundred pound, and he make one of them his Executor, this is held for a Release in Law of the Bond or Debt to them both. (n) So if one make his Debtor and another his Executors and die, in this Case, if that Executor who was not indebted to the Testator, survive the indebted Executor, he shall not have an Action of Debt against the Executor of his Co-executor, although the indebted Executor did not Administer in his life-time; for the Action

on was once extinguished and determined, and no Action can be brought, but in the Name of them both. (o) But if one that is indebted make his Creditor and another his Executors, the Creditor may have an Action if he do not Administer; (p) But when the Testator is indebted to me, and maketh me his Executor, I may detain the Goods for my Debt: So that it seems, that though the Action be extinct in regard of the Testator, yet the debt is still in *esse* in respect of strangers or other Creditors. (q)

dez Cafes, Edit. A. D. 1599. tit. Execut. nu. 3. & Fulb. supra. f. 44. & l. computatione. Cod. de jure Deliberandi.

3. When a Creditor to the Testator is made his Executor, he may detain so much of the Testators Goods, as whereby to satisfy himself in the first place before other Creditors. But withal, although the Testators Creditor, being made his Executor, be in as good case or better than other Creditors of the Testators, (r) and may allow his own Debt before other like Creditors, (s) and may detain so much of the Goods of the deceased in his own hands as his Debt doth amount to; (t) yet this is to be understood only, when he hath duly made an Inventory of the deceased's Goods according to Law: (u) Nor hath he such a clear power to pay himself before any other, unless his Debt be by Specialty or upon Record. (w) And as an Executor hath his Election to pay which Creditor he will first, that is of equal degree for quality of Debt; so hath he election to pay and satisfy himself of what part of the Testator's Goods he will, yea, though the Testator's Goods amount in all to no more than his own Debt, (x) And if there come not to the hands of such Executor Goods sufficient to pay himself, he may (as some conceive) have an Action of Debt against the other Executor where there are more than one. (y) *Sed Quere*, Whether after he hath once Administred, specially if he pay himself any part of the debt, he have not thereby barred or disabled his Suit for the residue: Otherwise he may sue the Heir for his Debt, if he hath not Administred as Executor; provided that the Bond extend to the Heir, which without express words it doth not, though for the Executor it be otherwise; and so may sue the Heir, if the Heir be bound, and he have not sufficient Goods as Executor. (z) Always observing, that although it be commonly spoken in the general, That an Executor may first pay himself, yet it is to be understood with this Caution or Condition, That the Debt to him be of equal weight and dignity with the Debts to others, for if his Testator were indebted to other men by any Statute, Judgment or Recognizance, and to him, whom he maketh Executor, only by Bond or other Specialty, then may he not first pay himself, that is, by paying of himself leave them unpaid whole Debts are

(o) 20 E. 4. 17. & 21 E. 4. 3. & 21 H. 7. 31. per Fineux.
(p) 8 E. 3. per Brian.
(q) 7 H. 1. 8. 27 H. 5. in Scin. fac.
7 Eliz. Com.
Greibrooks Case.
275. & Labridg.
Scimus § in Com.

(r) Dict. l. Scimus.
§ in Comput. & cap. Stat. § Statutum. l. 3. prin.
Conf. Cant.
(s) Plowd. in Cal. inter *Woodward and Parry*, & Labridg. dez Cafes. fol. 174. nu. 3.
(t) Fulb. ubi sup. fol. 44.
(u) Dict. L. Scimus § in Com.
(w) Plow. Com. 185.
(x) Offic. Exec. c. 2. nu. 4.
(y) Plow. Com. 185. & 13 H. 8. 15. & 11 H. 4. 83. & 12 H. 4. 21. & 20 Ed. 4. 17. 21 H. 4. 3.
(z) 21 H. 4. 27. & Offic. Exec. ubi supra.

of a higher nature; but if there be sufficient for satisfaction both to them and himself, then it is not material which of them is first paid. The like advantage doth the Law allow to an Administrator, who is one of the Intestates Creditors; of whom it hath been held, That such Administrator may retain Moneys or Goods of the Intestates in his own hands, for satisfaction of his own Debt;

(1) Mich. 11 Jac.
C. B. *Bond and
Green's Case*. Godb.
216. & Co. 5.
par. *Coulter's Case*.
(2) Ibid.

(1) which an Executor of his own wrong may not do (2) And therefore in an Action of Debt, wherein the case was, A man died Intestate; and a stranger possess'd himself of the Goods of the Intestate; afterwards Letters of Administration were granted to a Creditor of the Intestate, who brought an Action of Debt against the stranger, for the Debt due to him by the Intestate as Executor of his own wrong. The Question was, Whether the Creditor by taking the Letters of Administration, had not suspended his Action for the time that he should continue to be Administrator? The Opinion of the Court was That the Action was not suspended; for here is but a right to Assets in the Administrator, and no Assets in his hands to charge him withal; and the granting unto him Letters of Administration, hinders him not from bringing his Action, because the Goods were not taken away after the Administration granted, but before: And if they had been taken after the Administration, he might have had a Trover and Conversion, or an Action of Trespas for the taking of them. (3)

(3) Mich. 1652.
Rot. 686. B. R.
*Ashby and Child's
Case*. Styles 384.
Pasch. 1 Jac. B.
per Curiam. Roll.
Abridg. tit. execut.
A.
Trin. 7 Jac. B.
Rol. ibid. lit. G.

4. If an Obligee release to the Executor of the Obligor before Probate of the Will, it is a good Release, if he prove the Will afterwards.

If a Debtee die Intestate, and the Ordinary commit Administration to the Debtor, whereby the debt is extinct, [Q.] yet it shall be Assets in his hands as to Debts, because the Ordinary hath no power to discharge the Debt. It was agreed *per Curiam*.

Co. par. 8. 135.
*Sir John Needham's
Case*.

If Administration be committed to the Obligor, the same doth not extinguish the Debt; but if the Obligee doth make the Obligor his Executor, the same is a Release in Law of the Debt, because it is the act of the Obligee himself: But if a Woman, who is an Executrix takes the Debtor to Husband, and the Husband dieth, the same is no Release of the Debt, because it was only so suspended during the Coverture.

Trin. 12 Jac. C. B.
Fryer vers. Gildring.
Moo. Rep. nu.
1174.

The Father and Son were jointly and severally obliged to A. who made the Sons Wife his Executrix, and devised to her all his Goods after his Debts and Legacies paid, and dies; the Wife Administers, the Son makes his Wife also Executrix, and dies; the Wife dies Intestate, Administration of the Goods not Administred of the Obligee was committed to F. who sues G. the Father, who was the surviving joyn-Obligor. And the Court was of opinion, That the making of the Wife of one of the Obligors Executrix

was

was a suspension of the Action during such time as the Executrixship continued, as 8 El. 4 3. And *Nichols* Justice said, That a personal Action once suspended by the act of the party, as here by the act of the Obligee, in making the Wife of one of the Obligors his Executrix, shall be extinct for ever; otherwise if by the act of Law. And it seemed to the Court, That by the last Clause of the Devise of all Goods to the Wife, after his Debts and Legacies paid, the Obligation passed to the Wife. And inasmuch as that the duty and debt thereof is a thing in Action which by our Law cannot be transferred by a Devise, yet it shall enure as a Declaration of the intent of the Obligor, that the debt is extinct; and the Civil Law allows a Devise of debts due to the Testator to be good. And it is averred in the principal Case, That the Debts and Legacies are all paid: Whereupon Judgment was given, *Quod querens nihil capiat, &c.* By which it appears, That not only by the making of a Debtor one of the Executors, is the whole Debt extinct in Law, as well as if the Debtor were the sole Executor; but also the making of one of the joynt-Debtors Wives Executrix, seems to be a Release of the Debt: Inasmuch, that what is said of making a Debtor Executor, the same may be generally applied to the making of any one of the joynt-debtors an Executor. And therefore the Debt being once extinct by such a Release in Law, it should seem an improper Inference to hold (as some have done) That where one of the joynt Executors is a Debtor to the Testator, and dies, the surviving Executors may sue his Executor after his death, though they could not sue himself during his life.

2 R. 30. 20. per
Starkey. & 22. per
Wasson.

21. H. 7. 31. 20
E. 4. 17.

The Suggestion was, That whereas one was in debt to J. S. in 30 l. who after by Deed of Gift in his life-time, conveyed all his Goods and Chattels to A. and after made the Plaintiff and B. his Executors, and devised, that the Plaintiff should pay out of the 30 l. which he owed him, 10 l. to the Defendant for a Legacy; who brought the Plaintiff into the Ecclesiastical Court for the same; where by the Law the 30 l. Debt is extinct by making the Plaintiff Executor; and shewed that he had proved the Will, &c. And *per Curiam*, the Defendant shall have a Consultation, forasmuch as the joynt-Executor hath no remedy to recover the 30 l. against the Plaintiff his Co-Executor, nor can have any Action for the same during the Plaintiffs life, yet the Debt not extinct, but remains as Assets to any other Creditor, as is 8 E. 4. And by the same reason that one Debtor shall satisfy another Debt, it shall satisfy a Legacy also, and much the rather, in regard the express intent of the Testator was to that purpose, having precisely limited the Legacy to be paid out of the Debt. *Quod nota per totam Curiam.* And Consultation was granted accordingly. *Yelv.* Council for the Plaintiff.

Mich. 7 Jac. B. R.
Flud and *Rumsey's*
Case. *Yelv.* Rep.

Debtor suit Executor, uncore il
paiera Legacies.

C H A P. XII.

Of Heirs, Executors and Administrators in general.

1. *The general difference between an Executor and an Administrator ; and wherein they generally agree.*
2. *How the Heir differs from them both, and each from other, according to the Civil Law, in distinction to the Common Law of the Land.*

1. **T**hey differ thus, *viz.* an Executor is made either by the Testator, or by his own Acts ; but an Administrator is appointed only by the Judge. An Executor may appoint an Executor to the first Testator, so cannot an Administrator ; yet a bare and meer Executor, or a naked Executor to whom nothing is bequeathed in the Will, made choice of meerly for his care, and not at all for his profit, cannot bequeath the Testator's Goods in his Will by Legacies, no more than an Administrator ; for these Goods are to be employed only for the behoof of the Testator, in which respect such Executor is accountable as well as an Administrator : But of the profits and fruits which happen and arise of those Goods which belong to any as Executor, he may make his Testament, though not of the Goods themselves ; and so also in some cases may an Administrator. They agree thus, *viz.* an Administrator is entitled to all the Goods and Chattels of the Intestate, as well as an Executor to all the Goods and Chattels that belonged to the Testator ; they are both alike liable to payments of Debts and Legacies, and they are both accountable. These are the most general things, wherein they differ and agree. Their more particular agreements and disagreements are very many, according to their distinct Beings, Interests and Offices : For which reason the Reader for his fuller satisfaction in this point, is referred to his own Observations from the Contents of the several Chapters of this Testamentary Treatise.

2. How the Heir specially differs in his rights and interests from both an Executor and Administrator, is reserved for the subject matter of the two Chapters next following : Here therefore it is considered only how in general he differs from them both. The *Heir* at Common Law, is he that succeeds by right of Blood to Lands or Tenements in Fee. The *Executor* is he that by a Testator is appointed in his Testament for the execution thereof. And the *Administrator* is an accountable Commissioner authoriz'd by appointment of the Ordinary, for the disposal of the Goods of an Intestate.

Intestate. The Common and the Civil Law make different Constructions of the word [*Hæres*:] With the former, he is in a peculiar sense, *Hæres Sanguinis*; with the latter, he is in a general sense, *Hæres Hæreditatis*: And as at the one, the *Hæres* claims the Real Estate in Fee by a Sanguine descent; so the Executor at the other claims the Personal by a Testamentary Succession: But in a larger sense at the Civil Law: For there *Hæres ex Testamento succedit in universum jus Testatoris*, and what we call Executor is there known by no other name than *Hæres*; yet with us there is also *Hæres Testatoris*, in which sense he is commonly called an Heir, who succeeds by Testament in Fee, as well as he who by right of Blood. And both the Laws do nigh agree in this, That they both account the *Hæres* or *Executor*, the Representative of the Testator or deceased's person; which cannot properly be so said of an *Administrator*, for he is but *Executor Dativus*, where there is no Testator nor doth the *Civil* or *Canon* Law understand that word [*Administrator*,] in any other sense than in reference to *publick Government*. Notwithstanding it seems very Conjecturable, That the Office of an *Administrator*, as now practicable with us, had its Origination from that light which the Civil Law illustrated the World with: For albeit the Law with us for appointing of an *Administration* in case of Intestation, be very ancient, (a) yet its not improbable, but that the Concrediting this Trust with the Bishops, and such as under them exercise Ecclesiastical Jurisdiction, did originally take its hint from that Constitution of *Leo* the Emperor, (b) whereby the Bishops of the respective Diocesses wherein any persons did bequeath for or towards the Redemption of Captives, were to see it performed accordingly, in case none other were to that end appointed by the deceased.

(a) Westm. 2. An.
Ed. 1. c. 19. 31 &
Ed. 3. c. 11.

(b) L. 28. nulli
licere. c. de Epif.
& Cleric.

C H A P. XIII.

Of the Executors rights exclusively to the Heirs, or any others.

1. *The several divisions and distinctions of such things as come to the Executor; and what Chattels are.*
2. *Of such Chattels real, living and moveable, as accrew to Executor.*
3. *Of such Chattels real, without life and immoveable, to go to the Executor.*
4. *Of Chattels personal, living and moveable, belonging to the Executor.*
5. *Chattels personal without life and moveable pertaining to the Executor.*
6. *Several Laws in reference to this subject, specially to such things as are within the rights of Executors.*

1. **A**LL things that come unto an Executor, may be divided into things possessory and actually in the Testator, or into things only in action, and not actually in him; and the things possessory may be divided into Chattels real and immoveable, or into Chattels personal and moveable. Again, the possessory Chattels real may be divided unto things living, or into things without life. Also the personal Chattels or Goods moveable may be divided into things living, or things inanimate and without life. There are also comprehensive of some of these, Chattels principal, and Chattels accessory that follow the principal. So that Chattels are all possessions of Goods moveable and unmoveable, except such as are in the nature of a Free-hold, or parcel of it. And they are called real or immoveable, either because they are such in their own nature; or because they appertain to something real by way of dependance, as a Box with writings of Land, the body of a Ward, the fruit of a Tree, or the Tree it self upon the Land; or because they issue out of things immoveable, and of a more real nature, as Leases for years, at Will, Wardships, Tenants Estates by Statutes Merchant, Staple or Elegit, and Grants of the next Advowson.

2. *The Chattels Real, Living and Moveable, which did accrew to the Executor, were such as these, viz. Wardship, being a real Chattel in respect of a Tenure of Land, whereby was intended such Wardship as was by Knights Service, and not such as is by Socage*

cage Tenure ; also a Villain for years, as by Grant for a Term from him that had the Inheritance.

3. The *Chattels Real without Life and Immoveable*, that go to the Executors, are generally and for the most part in Houses or Lands, by Lease, or extent upon Judgments, Statutes, or Recognizances, or in things issuing out of Houses or Lands, as Rents, Commons, and the like, as arrerages of Rent behind at the Testators death, also Advowsons, Tithes, Fairs, Markets, profits of Leets, and the like, which the Testator had only for years. Also the Title accrewed to the Crown upon Attainder of Felony, where the party held not of the King, *viz.* the *Annum, Diem & Vastum*, that is, power not only to take the profits for a year, but also to waste and demolish, &c. is but a Chattel; and therefore though granted to one and his Heirs by the King, yet shall go to the Executor, not to the Heir. (a) Also a Lease for years, determinable upon lives, which is a Chattel, and shall go to the Executor; (b) as also doth an Extent upon a Statute. Likewise, if a Term for years grant his Term by Bequest or otherwise to A. and his Heirs: if A. dies, his Executors, not his Heirs shall have it, for it is no Inheritance. Or if such a Term grant a Rent out of the Land to A. and his Heirs, or the Heirs Male of his body, yet shall it go to the Executor, not to the Heir; for it being derived out of a Chattel, it self remains a meer Chattel, and becomes not any Inheritance. (c) Also, if a Rent be granted out of Land to one in Fee simple, Fee-tail, for life or years, and it be not paid to him in his life-time, the Arrears shall go to his Executor not to his Heir. Or if a man seized of Land and possessed of a stock of Cattel, let it for Years, and Covenant with the Lessee that he pay to him and his Wife, their Heirs and Assigns, One hundred pound *per annum* during the Term; in this Case after the death of the Lessor, his Wife surviving him, her Executor, and not his Heir, shall receive this payment. (d) Again, if A. grant the next Presentation of the Church of B. unto D. In this Case if D. dies, his Executor shall have it as a Chattel, (e) not the Heir. Or if A. grant a Lease for years of Land to D. and his Heirs, and D. dies; his Executor, and not his Heirs shall have this Term. (f) And if A. possessed of a Term of years of Land, grant it by Deed, or give it by Will to D. and his Heirs, or to D. and his Heirs males, or devise it by Will to B. for life, the Remainder to D. and his Heirs; in these Cases D. shall have these Terms of years as Chattels, and after his death his Executor shall have them. (g) Also, if a Lessee for life make a Lease for years absolutely; this in Law is a Lease for so many years, if the Life live so long, and shall go to the Executor after his death. (h) And if one makes a Feoffment in Fee of Land, the Feoffee covenanting to do divers things to the Feoffor, and to fore-

(a) No. Na. Bre-
88. Reg. Orig.
fol. 102.

(b) 37 Aff. p. 11.
*An Executor of a
Lord shall have
Fines Assessed upon
the Tenants at their
admittance in the
Lords time.
Rent.*

(c) Offic. Exec.
cap. 5.

(d) Dyer. 275.

(e) Dyer. 283.

34 H. 6. 27. Pre-
sentation.

(f) Coke 10. 17.

Littl. Sect. 740.

Fitzh. Account.

56. F. N. B. 120

& Brownl. 1 part.

77. 106.

Terms of years.

(g) Coke 8. 95. 10.

87. Plowd. 524.

Lease for years.

(h) Brownl. 19.

30. 1 part. Coke

7. 12

*Forfeitures on
breach of Cove-
nants.*

(l) F. N. B. 120
Fit. 2. Coven. 17.
(i) Sheph. Epit.
chap 155. fol. 983.
(k) *New Terms of
Law. Tit. Af-
figns. & Coke sup.
Littlet. 46,*

(l) No. Na. Br. 88.
Reg. Orig. fol. 102.
*This interest of a
Prisoner is valua-
ble, jure belli.*
Bro. no. ca. 295.
& tit. Property. 38.
& 1. H. 6. cap. 5
(m) Offic. Exec.
c. 5. §. 1.

(n) Ibid. cap. 5.

Corn standing.
(o) Perk. tit. De-
visie. fol. 99.
Hops.

Tythes set out.
(p) Offic. Ex. ubi
supra.
Garden Fruits.

(q) Ibid.
*Writings and E-
vidences touching
Chattels.*

Corn standing

feit Five pound to him and his Heirs, as oft as he shall fail perform-
ance, and the Feoffee doth fail and break his Covenant divers
ways, and the Feoffor dieth; in this case his Executor, not his
Heir, shall have and recover all the forfeitures that are past and
unpaid. (1) Also if any Goods or Chattels be granted to any
Heads of Bodies Politick and their Successors, their Executors, and
not their Successors, shall have them. (2) In like manner, if a Lease
for years be made to a Bishop and his Successors, and he die, his
Executor, not his Successor, is to have it. (k)

4. Among *the living Chattels Personal* that go to the Executor,
may be comprehended an Apprentice for years, the interest of a
Debtor in Execution for Debt, and in a Prisoner taken *Jure belli.*

(l) Also Cattel of all kind; yea, and Fishes in a Pond, Conies in
a Warren, Deer in a Park, Pigeons in a Dove-house, where the
Testator was but a Termor or Lessee thereof, for then they are to
go to his Executor as Accessory Chattels following the State of
their Principal, viz. the Pond, Warren, Park and Dove-house: (m)
Or if the Coneys, Pigeons, or Deer were all tame, they are then
likewise to go to the Executor, and not to the Heir; so likewise
are Hawks reclaimed; yea, it is Felony to steal Hawks young in
the Nest; which implies that they are Goods, and belong to the
Executor. (n)

5. *Chattels Personal, without life and moveable*, as all House-
holdstuff, Implements and Utensils, Money, Plate, Jewels, Corn,
Pulse, Hay, Wood felled, Wares, Merchandize, Ships, Carts, Plows,
Coaches, &c. are evident to belong to the Executor, not to the
Heir. And generally all things sowed, and not arising from the
Earth without manuring, go to the Executors; and such
things as grow of themselves to the Heir; therefore Corn in the
field growing or standing shall go to the Executor. (e) But Grass
growing and Fruit on the Trees to the Heir. Also Hops, though
not sowed, if planted; likewise Hemp and Saffron do, like Corn
growing, pertain to the Executor. Also after Corn reaped,
and before the Tythes set out, the Inheritor of the Tythes dying,
his Executor, and not his Heir, seems to have the best right to the
Tythe after set out. (p) Also things above ground in Gardens, as
Mellons of all kind, and the like, go to the Executor, not to the
Heir; as also all other things as have such a yearly setting or ma-
nurance, as severs them in interest from the soil. (q) Also the
Writings and Evidences that concern not the Inheritance, but only
Leases, Terms, Goods, Chattels, or Debts, pertain to the Execu-
tor. If one that holdeth Land for the Life of A. B. sow the Land,
and A. B. happen to die ere it be ripe and cut, and he that so
holdeth the Land happen to die also before it be ripe, the Execu-
tor of the Tenant shall have the Corn. And if the Tenant in Tail
sow

ſow the Land he doth ſo hold, and die ere it be cut, the Executor, not he in Reverſion, nor the Heir, nor the Iſſue in Tail ſhall have it. And if *A.* make a Feoffment of Land to *B.* excepting *Trees*, the *Trees* thereon, which he afterwards grants to *B.* for years, in this Caſe the *Trees* are in the nature of a Chattel, and if *B.* dies his Executor ſhall enjoy them. (*r*) Or if *A.* ſeiſed in Fee of Lands (*r*) Coke 4. 63, whereon *Trees* grow, ſell theſe *Trees* to *B.* who then dies before they be felled; in this Caſe the Executor or Adminiſtrator of *B.* ſhall have them, and may ſell or cut them down. (*f*) Laſtly (*f*) Coke 11. 50. The Executor, without contradiction of the Heir, may in any convenient time after the Teſtator's death, enter into the houſe deſcended to the Heir for the removing and taking away of the Goods, ſo as the door be open, or at leaſt the key be in the door; (*a*) but he cannot juſtifie the breaking open of the door of any Chamber to take Goods thence: But if the Goods be not removed in convenient time, the Heir may diſtrain them as *Damage Feſant*.

6. If a Leaſe for years be made to a Biſhop and his Succeſſors, and he die, his Executor, not his Succeſſor is to have it. (*u*) If a Preſentment to a Church happen to a Tenant in Tail, and he die before he Preſents, his Executor, not his Iſſue in Tail ſhall Preſent, becauſe the Chattel is not deſtroyed: Likewise if a Termer have a Preſentment which doth happen during the Term, though he do not Preſent, yet he ſhall have it. (*w*) If a Parſon, Vicar, Maſter of an Hoſpital, or any Body Politick, be poſſeſſed of any Goods or Chattels in their own right, and die, they ſhall go to their Executors or Adminiſtrators, not to their Succeſſors. (*x*) If a Leaſe be made for years, or the next Advowſon of a Church, or Covenant for payment of money, or the like, be granted, or an Obligation made to one and to his Heirs: In all theſe Caſes he hath this as a Chattel and it ſhall go to his Executor, and not to his Heir: So if any ſuch thing be granted to one and his Succeſſors, his Executor ſhall have it: And if the Heir or Succeſſor get the Deed, the Executor may recover it from them. (*y*) If one hath a Box, or Cheſt, or Trunk full of Writings at his death, and the ſame is open, not ſealed or locked, this ſhall go as Goods to his Executor: But if it were ſealed or locked, as incident to the Writings, it would be the Heirs whoſe the Writings be. (*z*) If a man hath a Term, and deviſeth the ſame to one, and the Heirs of his Body, his Heir ſhall not have it, but it ſhall go to his Executors, becauſe a Term which is but a Chattel, cannot be entailed. *Vid.* 28 *Eliz.* *Peacock's Caſe* and 21 *Eliz.* *Higgins* and *Mill's Caſe*, adjudged acc. In like manner, if a Deviſe be made of Land to one and the Heirs of his Body, for Five hundred years, it is a leaſe for years, and his Executors ſhall have it; for an Executor ſhall have all Leaſes for years: And

(*u*) *New terms of Law.* Tit. *Assigns.* & Coke ſup. *Littl.* 46.

Preſentation to a Church.

(*w*) *F.N. B.* 34. a. *B. Perk.* Sect. 97. *Bodies Politick.*

(*x*) Co 4. 65. *Perk.* Sect. 58. *Advowſon.*

(*y*) *Littl.* Sect. 740. 14 *H.* 4. 24 34 *H.* 8. 27. *F.N.B.* 120. *Broo.* Oblig. 18. 68. *Fitz.* Account 56. *Cheſt of Writings.* *Broo.* Executors. 97 145 *Fitzh.* Execut. 111.

(*z*) 22 *Ed.* 4. 7. & 3 *H.* 7. 15

Co. 10. 87

18 El. 4. 3. 41 Ed.
22. 14 H. 4. .6
Roll. Abr. tit.
Execut. lit. b.

although the Heir, and not the Executor, shall have the Writings which concern the Inheritance, yet the Executor, and not the Heir, shall have the Chest wherein such Writings are, if the Chest were not lock'd; but if lock'd, then the Heir shall also have the Chest, as aforesaid. So that it appears by the premises, That an Executor or Administrator, by virtue of his Executorship or Administration shall have all the *Chattels Real and Personal*, which belonged to the Testator or the deceased in his own right, as well those he had in *Action*, or in right of *Action*, as these he had in actual *Possession*: And therefore he shall have the *Leases* for years of Land, Rents, Commons, also Grants of next Advowsons, Presentations, Corn growing and cut, Trees and Grass cut and severed; all rights of Executions upon Judgments, Statutes, Obligations, and causes of *Action*; also all other things that are of the Nature of *Chattels*, therefore he shall have the *Relief*, or an *Advowson* that is fallen: Notwithstanding both which last, as to the one, the King, and not the Executor or Administrator of a Bishop shall Present, where a Bishop dies intitled to Present by the Vacation of a Church: And as to the other, it is said, the Heir, and not the Executor or Administrator shall have the *Relief*, if the deceased Lord of the Seignory had a greater Estate therein than for Lives or Years: But they (and not the Heir) shall have the *Fines* assessed upon the Tenants in the Lords life-time. Also they shall have the *Arrearages* of Rent reserved, as in the nature of a *Chattel*; as also the *Arrearages* of Rents-charge issuing out of Lands that were due to the Testator: Likewise the Executor or Administrator, and not the Successor of a *Parson*, shall have such *Arrearages* of an *Annuity* in Fee due to him in right of his Church, as were behind at the time of his Death: Also the Executors, and not the Heirs of a Lessor, shall have the Rents of *Chattel-Leases*; albeit the Lessee covenanted to pay it to him, his Heirs and Assigns, or to him and his Heirs: Or if a Feoffment in Fee of Land be made to one, excepting the Trees growing thereon, which are after granted to the Feoffee of the Land for a Term of years: In this case the Executor or Administrator of the Feoffee shall have the Trees in the nature of a *Chattel*: Also they shall have that next Presentation to a Church, which their deceased had at the time of his death; and all Charters, Writings and Evidences that concern the *Chattel Estate*, but not such as concern the Inheritance, nor such as relate to matters of Trust, or to things Personal concerning Offices of Trust. (1) For *Offices in Trust and Personal*, shall not go to the Executors or Administrators. (2) But an interest in an Avoidance of a Church, is in the nature of a *Chattel*, and shall go to the Executors, and may be released by them. (3) But if a Recognizance be entred and acknowledged to the *Chamberlain* of

- (1) 11 H. 4. 20.
Noy's Maxims 7
Co. on Lit. 79.
Dyer. 130. 24. 183.
Brook Exec. 143.
Dyer. 537. 283.
275.
F. N. B. 120. Co.
4. 48. 36 H. 6. 27.
Plow. 293.
Co. 3. 39.
Kelw. 118.
Co. 4. 64.
21 H. 7. 26.
(2) Co. 9. 96.
(3) Golds b. 112.

London,

London, and his Successors, by Custom of *Orphanage* money, this *Recognizance*, when he dieth, shall go to the *Chamberlain's* Successors, and not to his Executors or Administrators. (4) And as for an *Advowson*, it is an interest: But the grant of a *next Avoidance*, is an interest which will go to the Executors, as aforesaid. (5) And the Executors of a Bishop, Dean, Parson, Vicar, &c. shall have such Obligations as are made to them and their Successors. (6)

(4) Co. 4. 65.

(5) Goldsb. ubi supra.

(6) Hob. 64.

If a man be possessed of a Term of years, and he Devise it to another and his Heirs, or his Heirs males: By this Devise the Executors or Administrators, not the Heirs of the Devisee, shall have the Term. (7) And therefore if a Lessee for years of Land devise all his interest therein to his Wife, if she live so long; and if after her death any part of the Term be yet remaining, and to come, then that it go to *A. B.* and his Son, and the Heirs of his body: By this Devise the Executors and Administrators of *A. B.* and not his Heir shall take, at least so long as he hath any Heirs of his body. And yet if one possessed of a Term of years, Devise it to *A. B.* and after his death, That the Heir of *A. B.* shall have it: By this Devise *A. B.* shall have so many years of the Term as he shall live, and the Heir of *A. B.* and the Executor of that Heir shall have the residue of the Term. (8) But if a Devise of Land be made to *C. D.* and the Heirs males of his Body, for a certain Term of years: By this it seems *C. D.* hath but a Lease for so many years, if the Heirs males of his body shall so long continue, and that for want of Issue male, the term of years shall end. And in this case the Executor or Administrator, not the Heirs Males of *C. D.* shall have it after his death. (9)

(7) Co. 10. 46. Perk. Sect. 556, 558.

(8) Brownl. 1. 47. 131. Croo. 2. 198. 509.

(9) Co. 10. 8. 47. 7. Yelvert. 73.

Although Trees standing and growing on Fee-simple Land, and not severed from the ground do go to the Heir together with the Land; yet if such Trees be sold for money, and the Vendee afterwards happen to die before they be cut and severed from the ground, his Executor or Administrator shall have them, and may cut them down. (10) Otherwise, if after he purchase the Land also whereon they grow; in which Case his Heir, and not his Executor shall have them.

(10) Co. 11. 50. Perk. Sect. 58

If the Husband sow the Land, whereof he hath an Estate in Fee-simple, Fee-tail, for Life, or a certain Term of years in right of his Wife, and die ere the Corn be ripe. In this Case, the Husband's Executor or Administrator, and not the Wife, shall have the Corn: So if one that holdeth Land for the life of another, sow that Land with Corn, and he for whose life he holds die (and the Tenant also) ere it be ripe or cut, the Tenant's Executor or Administrator shall have it. The case is the same with a Tenant in Tail, or in Dower, who sow the Land they so hold, and die ere the.

the.

the Corn be ripe ; in such Case the Executor or Administrator, not the Issue in Tail, nor the Heir, nor he in Reversion, shall have the Corn, as aforesaid. Also if the Husband make a Feoffment in Fee to the use of himself for life, and after of his Wife, and he sow the Land, and after die ere the Corn be cut, his Executors or Administrators, and not his Wife, shall have it : otherwise it is, in case of a Feoffment, to the use of the Husband and Wife together in Fee, or for Life ; in which Case the Wife, and not the Executor or Administrator of the Husband that sowed the Land, shall have the Corn, in case he dies before it be ripe. (11)

(11) Dyer. 326.
Dr. & Stud. 35.
Perk. Sect. 59.

Tenant in *Dower*, made a Lease for years, rendring Rent, and took a Husband, the Rent was behind, the Husband died ; and it was held, That his Executors, and not the Wife, should have the Rent. (12)

(12) More. case.
25.

If *A.* sow the Land, and convey it to *B.* for life, the Remainder to *C.* for life ; if *B.* die before the Land be reaped, *C.* and not the Executors of *B.* shall have the Corn : And if they both die, then *A.* shall have it, and neither of their Executors. (13)

(13) Hob. 132.

CHAP. XIV.

Of the Heirs rights exclusively to the Executors.

1. *Of things Personal that go the Heir, not to the Executor.*
2. *Of things Real that belong to the Heir, not to the Executor.*
3. *Law Cases touching this subject.*

1. **T**O the Heir, not to the Executor, do belong Fishes in a Pond, Coneys in a Warren, Deer in a Park, and Pidgeons in a Dove-house, where the Testator had the Inheritance in the Pond, Warren, Park or Dove-house ; for such are not Chattels at all in that Case, nor to go to the Executor, but to the Heir together with the Inheritance. (a) Also Grass growing for Hay, and Trees growing or standing (except as in the last precedent Chapter) and the Fruit thereon, go to the Heir, not the Executor. (b) Also Glasse, whether by nails or otherwise affixed to the windows, either by the Lord or the Lessee, descends not to the Executor, but to the Heir, as being made parcel of the Freehold or Inheritance of the House. (c) But if there be Glasse from the Windows, or Wainscot loose, or Doors more than are used, that are not hanging, they shall then go to the Executor. (d) As to the Heirs rights, the Law is the same as to Wainscot, if affixed or fastened to the House ; (e) yet

(a) Kelways Rep. fol. 118.
(b) Perk. tit. Devise, fol. 99.
(c) Coke Rep. lib. 4. in *Herlakenden's Case*, in fin. fol. 63, 64.
(d) Coke 4. 63.
21 H. 7. 26.
(e) Coke ubi sup. in *Herlakenden's Case*.

yet by the Civil Law such things as are in the house more for Ornament than Structure, pertain not to the house. (f) Nor is it material whether the Wainscot be fastned by great or little nails, by skrews or irons thrust through, or by other ways or means; for it sufficeth to make it parcel of the Freehold, and consequently to go to the Heir, not to the Executor, if it be any way affixed or fastned to any part of the house. The Law is also the same concerning all things fastned to the Freehold, or to the ground by mortar or stone, as Tables, Dormants, Leads, Mangers, Millstones, Anvils, Doors, Keys, Glas-windows, and the like; for none of these be Chattels, but parcels of the Freehold, and therefore belong to the Heir, not to the Executor. (g) Also Writings and Evidences that concern the Inheritance, do pertain to the Heir; also the Boxes and Chelts wherein the Writings and Evidences of Inheritance are kept, and usually have ever been imploy'd only for that service, shall go to the Heir, not to the Executor whether sealed or not sealed, lock'd or not lock'd. (h) Also in some Cases Corn in the ground shall go to the Heir, not to the Executor; for if a Lessee for years certain sow the Land a little before the end of his Term, and the Term end before it be cut; in this Case he that is to have the Land, not the Executor of the Lessee for years, shall have the Corn. (i) And if one be seized of Land in Fee, and thereof make a Lease for years, paying Rent at *Michaelmas*, or within ten days next after, and the Lessor happen to die within the term after *Michaelmas* and before the ten days expired; in this Case the Heir of the Lessor, and not his Executor, shall have the last half years Rent due at *Michaelmas*. (k) Lastly, Things under ground, whether in Gardens or elsewhere, as Carrets, Parsnips, Turneps, Skerrets, and other such like things under ground, shall go to the Heir, not to the Executor.

2. Where a Rent is reserved upon a Lease for years, there it shall not go to the Executor, but to the Heir with the Reversion, other than the arrearages of such Rent as were behind at the time of the Testator's death; for such belong to the Executor, not to the Heir. (m) If *A.* mortgage the Inheritance of Land to *B.* upon Condition of Redemption by payment of One hundred pound to *B.* his Heir or Executor, and *B.* dies, the Deeds being delivered into his hands; in this case the Heir, not the Executor shall have the Deeds: For though the money may be paid to the Executor, yet in the mean time the Land descends to the Heir; nor is there any debt to the Executor, because it is in the Election of *A.* whether he will pay or not. But if on the other side, the Land had been fold for One hundred pound not paid to *A.* but a Condition, that if not paid to him, his Heir or Executor by such a day, then to re-enter, and *A.* dieth; in this case there is a debt to his Executor,

(f) Rebuff. & D. D. in L. pen. ff. de Verb. Sign. In the latter end of Hen. VII's

time, an Executor taking a Furnace, which was set in the middle of a Room, and not fixed to any wall, was adjudged a Trespasser to the Heir.

(g) Kelways Rep. fol. 88. nu. 2. & 1st abridg. dez. Cases. tit. Exec. fol. 181. nu. 4. & Offic. Ex. ubi supra.

(h) Offic. Ex. cap. 5. & 4th E. 3. 2. & 36 H. 6. 26. & 18 E. 3. 4. & 3 H. 7. 15.

(i) Dyer. 316. & D. & Stud. 35. & Perk. Sect 59.

(k) Hill. 7 Jac. B. R. per curiam.

(l) Offic. Ex. cap. 5.

(m) Sta. 32. H. 8. cap. 37. & Coke 4. 48.

(n) Offic. Ex.
ubi. supra.

(o) Littl. Inst. l. 3.
c. 5. Sect 339.

(p) Ibid.

43 E. 3. 2. 10 E.
4. 5, 6.
Fitz. Exec. 53.
84. 117.

(q) Perk. tit.
Devise, fol. 104,
105. & Brook.
Abridg. tit. De-
vise 1, nu. 9.

(r) Ibid.

(f) Kelways.
Rep. fol. 107,
108. nu. 25.

(t) Hill. 20 Eliz.
Dyer 361. vid.
Flo. Com. 114.
& 259. acc.

(u) Dyer's Read.
in Stat. of Wills.
Sect. 3. §. 4.

tor, and no Land descended to the Heir of *A.* yet shall the Heir have the Deeds, because there is a Condition descended to him-
(*n*) But if a Feoffee in Mortgage, before the day of payment which should be made to him, make his Executors, and die, and his Heir entrench into the Land as he ought; in this case the Feoffor ought to pay the money at the day appointed to the Executors, and not to the Heir of the Feoffee: (*o*) Unless the Condition were, That the Feoffor pay to the Feoffee, or to his Heirs, such a sum of money at such a day, then it ought to be paid to his Heir. (*p*) Also where the Testator recovereth Land and Damages, or a Deed and Damages, and dies before Execution, the Heir shall have Execution for the Land or Deed, and the Executor for the Damages; but until the Heir sue a *Scire Facias*, the Executor cannot sue Execution for the Damages; for Execution must be first of the Deed, then of the Damages. Also, if Executors keep in their own hands for the space of one, two or three years Lands devised by Will to be sold for any purpose, converting in the mean time the profits thereof to their own proper use, the Heir of the Testator may enter to the Lands, and put out the Executors, (*q*) unless the money for the Land to be sold, be to be distributed *in Pios usus*; (*r*) because in this case the Frank-tenement, after the Testators death, is in the Executors, not in the Heir: (*s*) for which reason the Heir cannot enter in this case, as he might in the former.

3. In an Action of Debt brought against the Executors, they were at Issue if Assets were in their hands or not; and the Jury found by a Special Verdict, That the Testator was seized of a House in Fee, and made a Lease thereof, and of certain Implements of Household in it for years, rendering Rent to him, his Heirs and Assigns; and found that the Executors after the death of the Testator, continually received the Rent, and prayed advice of the Court, if the same were Assets in the Executors hands? And the Opinion of the Court was, That it was not Assets; for that the whole Rent was to go with the Land in Reversion, as *magis digne*; and so did belong to the Heir, not the Executors. (*t*)

A man willeth, that after twenty years after the death of the Devisor, *J. S.* shall have the Land in Fee; the Heir of the Devisor shall have the Land during the Term, and not the Executors. (*u*)

A Lease is made the first day of *October*, for ten years from *Michaelmas* last, paying Twenty pound at the Feast of *St. Michael*, or within a month after: If in this case the Lessor die between the Feast and the end of the month, the Heir, and not the Executors, shall have this Rent. (*v*)

(s) 10 Co. 129.

A Term of years granted by Deed to *A.* if he live so long, and if he die within the Term, then to remain to *B.* is a void Remainder; but by Will it is otherwise: And yet if *B.* dye, living *A.* it seems the Executor of *B.* shall not have it: For it is but a meer possibility and casualty, and no interest. (2)

(2) Bulstr. 1. 152.
Co. 1. 25.

If a Lessee for years certain, sow the Land so short a time before Harvest, and before the end of the Term, that according to the course of Husbandry, the Corn cannot be ripe and cut before the Term expires; in this case the Heir, or he to whom the Land comes, and not the Lessee's Executor or Administrator, in case the Lessee die ere the Corn be ripe, shall have it; for the Lessee himself could not have reap'd it if he had lived. (3)

(3) Dyer. 326.
Perk. Sect. 59.

There is a wide difference between the right of the Heir and the Executor, as to moneys conditionally payable to the Vendor or Vendee, upon the Conveyance of Land: For if it be upon condition of payment to the Vendor, his Heirs or Assigns, and he dies before the time of payment, the money shall go to his Executors: But if it be payable to the Vendee, his Heirs or Assigns, and he die before the time of payment, it shall go to his Heir. (4)

(4) Co. 1. 3. fo. 90,
91. vid. Lit. fo.
77. b. 2. Eliz.
Dyer. 281. Plow.
Com. 291.

In *Trespass* for entring his Close, and taking his Fish out of his Fish-pond with Nets. The Defendant pleaded, That before the Trespass, *A.* was seised of the Close and Pond, and put the Fishes in it, and made him his Executor, by virtue whereof he took the Fish: And it was held, That they were such *Chartels descendable*, as that the Heir, and not the Executor should have them. (5)

(5) Goldsb. 139.

C H A P. XV.

Of things which go neither to the Heir, nor Executor, and in what Cases.

1. *Bona Paraphernalia, what : They go neither to the Heir, nor to the Executor.*
2. *Things in Joynt-Tenancy go to neither of them.*
3. *Things willed by the Testator to be sold for certain uses go to neither of them.*
4. *The Goods of a Testator, left by his Intestate Executor, go to neither of them.*
5. *A Lease simply for three lives, goes neither to the Heir nor Executor.*
6. *Lands, Goods or Chattels belonging to a Colledge, Hospital, or other Societies, or Bodies Politick, are of like nature.*
7. *A Case of Remark in Law, touching Bona Paraphernalia.*

(2) Mynsing. In-
stit. 97.

(b) Ulp. in l. 9.

§. 2. ff. de jur.

Dor.

*What Parapherna-
lia are*, vid. Alex.

Consil. lib. 1.

Consil. 42. Col. 6.

verf. nec. obstat.

& lib. 2. Conf. 6.3

Col. ult.

(c) Dyer. fo. 166.

& 33 H. 6. fo. 31.

(d) 37 H. 6. 28. &

Broo. Execut. 19.

(e) 12 H. 7. 23 &

18. Ed. 4. 11. 9.

(f) 18 Ed. 4. ib.

per *Vnafor*.

(g) L. hac. lege.

& l. fin. Cod. de

Paft. Con. super

Dor.

(h) L. ob Mari-

torum. Cod. ne.

Ux. pro Marito.

1. **B**Y the Civil Law, *Bona Paraphernalia sunt quæ mulier ultra dotem adfert* ; it is a word borrowed from the Greek, *ἐκ πατρὸς & μητρὸς* viz. *præter & Des* : The use and occupation whereof, though in a peculiar sense belonging to the Wife ; yet not in such a separate way, but that the Husband, during his life, and by any act executed in his like-time, may dispose thereof, or without his Wife's special Mandate, may commence any Action, or sue for the same ; (a) But in a proper sense, they are such things as are peculiar to the Wife, as suitable to her condition, and necessary or convenient for her use in her Husband's Family. (b) And therefore we are not under that notion of *Bona Paraphernalia*, even by Common Law to understand the Wife's Apparel, with her Bed, Jewels and Ornaments for her Person, but her convenient Apparel, and only such as is agreeable to her degree, which shall go to the Wife only, as other goods do, to the Executor ; (c) For the Wife after her Husband's death, shall have the Apparel necessary for her, and not her Husband's Executors. (d) Where mention is made hereof at the Common Law, it is there called *Bona Paraphernalia* ; (e) and the Wives Apparel, called *Bona Paraphernalia*. (f) These Goods, so called, belonging to the Wife, descend not by the Civil Law, either to the Heir or Executor, (g) nor are they by that Law subject unto payment to the Husband's debts. (h) But as in things meerly in Action, and whereof the Wife was not possessed during the Coverture, she may (as is supposed) make a De-
vise

wife thereof, or by her Testament make her Husband her Executor, so also of her *Paraphernalia*; (i) which though some do doubt of, yet it is evident, That her Husband may not devise them away from her (k)

2. Such things as are in Joynt-Tenancy, shall go neither to the Heir, nor Executor: For upon the death of the Joynt-Tenant, they go to the other Joynt-Tenant surviving, and that by right of Survivorship. Otherwise it is with Tenants in common: For

if *A.* and *B.* have Goods or Chattels in Joynt-Tenancy, and if either of them grant what to him belongs unto a third person, in this case, that third person, and he which kept his part unfold, are Tenants in common: And therefore when either of them two diess the deceased's part of such Goods and Chattels shall go to his Executor, and not to the surviving Tenant in common. (l) Also, if

husband and wife be Joynt-Tenants of Land, and the husband die, the very Corn growing thereon shall survive to her together with the Land, And although the husband sowed it, yet shall it not go to his Executors. (m) Or if they were Joynt-Tenants of a Term for

years, and the husband happen to be *Felo de se*; in that case, nothing accreus to the Heir or Executor, but all shall survive to the wife, until the Office be found for the King upon the Forfeiture. (n)

3. The Moneys or Proceed of Lands willed by the Testator for certain uses to be sold, are not accounted as any of the Goods or Chattels of the person deceased; (o) and consequently do go neither to the Heir, nor to the Executor, but to the uses for which it was willed to be sold.

4. If an Executor seized of Goods or Chattels belonging to his Testator, die Intestate, such Goods go neither to Heir nor Executor; but Administration thereof as *de bonis non, &c.* is by the Ordinary to be committed to such as to whom by Law it appertains.

5. If one have a Lease simply for three Lives, to him and his Assigns, this is no Chattel, and therefore shall not go to his Executor, if he die seized thereof; and it is no Land, therefore shall not go to his Heir: But in this case it shall go to him who first after the Testators death enters, and claims it as an Occupant, if no Assignment thereof were made in the life-time of the Lessee: But a Lease for years determinable upon lives, is a Chattel, and shall go to the Executors. (p) But for a Lease for the life or lives of others, is neither a Chattel, nor an Estate of Inheritance, and so not within the Statute of Wills; otherwise it is of a Lease for years determinable upon a life or lives, as aforesaid.

6. The Lands, Tenements, Goods and Chattels belonging to any Society, Church, Colledge, Hospital, or to any Corporation

(q) Co. 4. 65.
Perk. Sect. 58.
Trin. 8. Car. B. R.
Rot. 1331. Lord
Hastings ver. Sir
Archibald
Douglass. Gro. See
the Case at large,

or Body Politick, in the possession of any Mayor and Comminalty, Dean and Chapter, Parson, Vicar, Master or Head, go not upon either of their deaths to the Heir or Executor, but to their Successors; yet when either of these, having Goods, or Chattels in his own right, dies, they go to his Executor or Administrator, and not to his Successor. (q)

7. Action *sur Trover & Conversion*: Lord Hastings as Administrator of Serjeant Davies for divers Jewels. Upon *Not-guilty* pleaded, the Jury found, for part *Not guilty*; for other Jewels, *Guilt*: And for 65 great, and 65 small Pearls, and a Diamond chain, they found a Special Verdict, That *D.* being possess'd thereof devised the use and occupation of all his Plate, Hangings and Jewels to Dame *E.* his Wife, during her Widowhood *she giving good Security to my Daughter L. Lady Hastings, to deliver and leave the same to my said Daughter L. at the day of her Death, or second Marriage, which should first happen.* That the Administration of the Goods of *D.* was committed to the Plaintiff. That the said *E.* the Wife of *D.* was the Daughter of the Lord Audley, Earl of Castle-haven, and that she in the life of *D.* used the said Jewels, *Et ut ornamenta corporis sui*, usually were them. That afterwards the said *E.* married with the Defendant, and that he converted those Jewels, &c. Berkley and Jones for the Defendant, That she being the Daughter of a Nobleman, and permitted to use them frequently, *Ut ornamenta corporis sui*, and they being convenient for her degree, she should have them as her *Paraphernalia*, and that against her Husbands Executors, there being no Debts to be paid, that the Husband could not devise them from her, but instantly by his death (the possession thereof being in the Wife's Custody) the Property vests in her: That it appears by *Lynwood*, That the wife against her husband's Will, hath such an interest in Goods which are her *Paraphernalia*, that the husband hath nothing to do with them; but she may make a Will of them in her husband's life-time, and may dispose of them *in vita Mariti, invito Marito*: But they said That is not allowable in our Law, That she should dispose of them in her husband's life-time, but when the husband doth not dispose of them they are instantly vested in the Wife: And although the husband may make a Gift of them in his life-time, yet he cannot make a Will of them, to dispose, &c. The King may give the Jewels of his Crown by Letters Patents, but he cannot by his Testament dispose of them. And Jones said, That by the Civil Law, as the Condition to tie her from Marriage, so the Limitation to have these Jewels during her Widowhood, is void, because she is absolutely possessed of them. But Richardson Chief Justice, and Croke Justice, This is a good Will, and she may not take them, but according to the Will: but if the husband had not made a Will, but

but had left them to the disposition of the Law, and the Question had been betwixt the Executor or Administrator, and the Wife ; where there be not any Debts or Legacies to be paid, or where there be *Assets* (besides those Jewels) to pay them all, there peradventure the Law will allow her to take and enjoy them as her *Paraphernalia* : But where the husband hath made a Will, and limited how she shall have them, she ought to take them as the husband appointed, and his Will is as good and as well to be performed, as his Gift in his life time : And the husband's permission for the wife to wear them, is not a Gift of them to her, either in Deed or in Law ; for the husband cannot give ought to his wife, they being both but one person in Law. And a man who hath a thing Real, or Chattel Personal in anothers right, although he may give, yet he cannot Devise it ; as in *Bracebridge's Case*, *Plow.* 192. So where an Executor makes a Gift of Goods, which he hath as Executor, it is a good Gift ; but a Devise of them is not Good, because he hath them *in anter droit* : But of all Chattels Personal, although the wife had them before Marriage, the absolute property by the Marriage is vested in the husband, and he may give them in his life, or dispose of them by his Will : So of these Goods which are termed *Paraphernalia*, the absolute property is in the husband ; and therefore he may well devise them, &c. And the Goods which she claims as *Paraphernalia*, are not given to the Wife, but those which are of necessity and conveniency for her : And when the husband leaves her what is for her necessity *viz.* Necessary Apparel, he may well make a Disposition of the residue by his Will : And for that purpose was cited 19 *Hen. 6.* 14. And where the *Civil Law* saith, That she may make a Will in the life of her husband of her *Paraphernalia*, yet the Common Law (whereby we are to be guided) is expressly contrary to it. And that the interest, possession and property of such Goods as are called *Paraphernalia*, are in the husband, and he may devise them to his Wife, and that she shall take them by the Devise, appears 33 *H. 6.* 31. where he devised to his wife her Apparel, and she justifies the taking of them by the Devise and delivery of the Executors, 37 *H. 6.* 28. That she ought to take only her necessary Apparel, (1) that the property and possession of these Goods be in the husband, and she may not make a Will of them without his assent : And that in this case, the husband having expressly disposed of them by his Will, she may not against his Will take them, without the Administrators assent and delivery : And that here is no Condition of restraining Marriage, according to the *Civil Law*, but a Limitation only, and it is reasonable she should take accordingly : And here is no Devise of the Jewels, but only of the use and occupation thereof during Widowhood. And it was adjudged for the Plaintiff.

(1) 1 *Eliz.* Dyer.
166. 18 Ed. 4.
11. 12 *H. 7.* 23,
24. *vid.* Trin.
28 *Eliz.* *Case of*
the Treasurer and
other, Executors of
Viscount Bindon,
vers. Mary
Viscountess Bindon,
touching Jewels.

C H A P. XVI.

Of Co-Executors.

- Their Indivisibility } *1. In point of Power and Authority.*
2. In point of Interest and Possession.
3. In case of Plaintiffs or Defendants in Pleadings.
4. Cases in Law pertinent to the premises.

1. **W**Here there are more Executors than one, or Joynt-Executors to the same Testator, one of them cannot give nor release his interest to the other; or if he doth, it is void; and he who so releaseth, shall still have as much interest as he to whom he released, because each had the whole before. (a) Therefore if one Executor release but his part of a Debt, it hath been held that the whole is discharged. But if one Executor alone sell Goods of the Testator, he alone may maintain an Action of Debt for the money. (b) So if Goods be taken out of the possession of one Executor, he alone may maintain an Action for the same, and that without naming himself Executor. (c) Also, one Executor not joining in Suit with another, may any time before Judgment release, but after Judgment he cannot, because then it is altered in nature, and turn'd into *rem Judicatam*. And though many Executors to one and the same Testator make but one Executor, yet the devastation, waste, or misdoing of one shall not charge the rest, nor make their Goods liable for recompence; (d) but himself shall answer for it with his own Goods, yet no further than the value of the Testator's Goods so wasted or misadministr'd. And although many Co-Executors are regularly but as one, in the eye of the Law; insomuch, that where there are several Joynt-Executors, the Act, Possession, Payment, Delivery, Sale, Gift, Release, Plea and Assent of any one of them, is for the most part the same of them all; yet whether it be so in case of divers Administrators is a Question: For though most are of Opinion, That some or one of them may, without the other, sell Goods, release Debts, Plead to Actions, and the like; (1) yet this is doubted by others, in regard they all have but one entire Authority wherein they ought to joyn in what they do. (2)

2. If one of the Executors where there be two or more, grant his part of the Testator's Goods, all passeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moyeties

(a) 9 E. 4. 12. 14.
 21 E. 2. 13.
 27 H. 8. 21, 22.

(b) 38. E. 3. f. 9.

(c) Offic. Ex. c. 9.

(d) *Book of Entries, and so held in An. 12 H. 7. Lib. Entr. f. 327. & Kelw. Rep. fo. 23. & 11 H. 6. 38. & 4 Eliz. Dyer. 210. & P. 4. H. 6. Rot. 303. Tr. 34. El. Pas. 36. Eliz.*

(1) Golds b. 141.

(2) *Crompt. 45. 4 H. 7. 4.*

moyeties between Executors : Thus, if an Horſe come to four Executors, each hath a Horſe, and yet all four have but one. Alſo though a Leaſe for one thouſand years, of one thouſand Acres of Land come to two Executors or more, no partition or diviſion can be made between them, becauſe it is not between them as between joyn-Teſſees of Land, where each hath but a moiety in intereſt, though poſſeſſion of and through the whole, but among Executors each hath the whole ; and therefore if he grants his part, he grants the whole ; yet one Executor may demile or grant the moiety of the Land for the whole term, and ſo may the other ; And this way they may ſettle a moiety for each in ſome third perſon intruſted for them, but one Executor cannot make a Leaſe to the other of any part, becauſe he had the whole before ; nor can one of them ſue the other as Executor, unleſs the Teſtator deviſe to one of his Executors all his Goods, after ſuch Debts and Legacies paid and ſatiſfied ; for in ſuch caſe, after ſatiſfaction thereof, that Executor may take the remainder of the Goods, and maintain an Action of Treſpaſs againſt the other, if he take them from him, and conſequently an Action of Detinue, if he keep or detain them ; but this he may do, not as Executor, but as Legatee. So that regularly one Executor cannot ſue another of his Co-Executors touching any thing relating to their Teſtators Will, or that is within the power, intereſt, duty or office of an Executor ; only in the caſe, where the one of them is as well the Reſiduary Legatary of the reſt of the Teſtators Goods and Chattels after Debts and Legacies paid, as Executor : In that caſe, if the other Executors with-hold or detain ſuch reſidue of the Teſtators Eſtate, or any part thereof, from ſuch Reſiduary Legatary-Executor, he is not without a remedy at Law againſt them for the ſame.

(3.) But if two men have a Leaſe or Term of years as Executors, and the one of them grant all his right and intereſt, and all that appertains unto him, by virtue of the Leaſe unto *A. B.* the whole Term of years paſſeth, becauſe every Executor hath an entire authority and intereſt ; otherwiſe in caſe of Joynt-Tenancy.

3. Where there are divers Executors, they are all but as one perſon, and therefore cannot plead ſeveral Pleas, being ſued ; (e) all of them repreſent the Teſtator's perſon, and they muſt all joyn in Suits as Plaintiffs, and by joyned as Defendants, or at leaſt ſo many of them as have Adminiſtered ; therefore one Executor ſued if he plead that there is another Executor not ſued, muſt alſo plead that that other hath Adminiſtered. (f) Thus Executors, though never ſo many, repreſent the perſon of the Teſtator as one perſon. (g) Therefore all of them ſhall have but one Eſſoyne, neither before appearance nor after, becauſe their Teſtator himſelf, whoſe perſon they repreſent, could have no more. And therefore where

Executors

Two have a Leaſe for years as joyn-Executors, if one of them alien the whole it ſhall bind the other ; for each hath an entire power to diſpoſe the whole, both being poſſeſſed in right of the Teſtator. 37 Eliz. B. R. inter Farnell & Fen. Agreed and Adjudged. Roll. Abridg. tit. Exec. lit. G.

(3) 27 H. 8. 21.
6 H. 7. 5. Plow.
343. Fitz. Exec. 6.
Benl. 10.

(e) 27 H. 6. 17.
9 H. 6. fol. 44.
38 E. 3. 9. Brook.
Exec. 13. 20, 21

(f) 2 H. 6. fol. 44
Bro. 13. 33 H. 6.
38. Bro. 20.
(g) 9 Ed. 3. cap. 3.

(h) Offic. Ex.c. 9.

(i) 37 H. 6. 30. &

7 H. 4. 13.

(k) 8. Ed. 4. 24.

Execut. 31.

(l) Fulb. Paral.

part. 2. Dialog 3.

fol. 33.

(m) Per Fitz. &

al Justice. 23 H. 8.

& Hill. 9 H. 7.

fol. 1. & 17.

(n) 14 H. 7. fol.
28, & 29.

Executors as Defendants have appeared, if any one of them will confess the Action, this binds and concludes the rest; but if one will plead one Plea, and the other another, some are of opinion, that that shall be received which is best for the Testator's Estate. So where they sue, such as will not prosecute shall be severed, and the rest without them may proceed. (b) It is evident by what hath been said, That two Joynt-Executors being sued, can not plead two distinct Pleas, because they both represent but one person, *viz.* the Testator, who could have but one only Plea. (i) Yet others say, they shall have several Pleas, and the most peremptory shall be tried. (k) And if any one of the Joynt-Executors Plaintiffs dies, the Writ abates, though he so dying was for non-appearance on summons before severed; and so it is, if one of the Co-Executors Defendants die. Yea, if a Creditor sue *A. B. C.* as Executors, where only *A.* and *B.* are Executors, even there be the death of *C.* the Writ abates. Also if a man make three Executors, whereof two refuse the Administration, yet they shall be Executors by the Will, and may Administer when they please, and an Action ought to be in all their Names, otherwise the Writ shall abate. (l)

4. Therefore if Executors plead, that they are not right named in the Writ, and that there is another Executor not named in the Writ, which is living, &c. which concerneth the Writ, (m) although they may have knowledge thereof, yet Judgment shall be of the Testator's own proper Goods, and not of the Goods of the Executors.

Action of Debt was brought against three Executors, and at the Distress two of them appeared, and the third made default: The two which appeared confessed the Action; whereupon Judgment was given against them all of the Goods of the Testator: But before Execution the Plaintiff died, whose Executors brought *Scire Facias* against the said three other Executors: And the two which confessed the Action made default: But he which first made default appeared, and pleaded, That he was never Executor, nor ever Administred as Administrator or Executor, which was found against him: And Judgment was given against them which made default, for recovery of the Goods of the deceased, &c. (n)

C H A P. XVII.

Of the Executors Interest and Possession ; and how it differs from that which he hath in his own proper Goods.

1. *What may be said to be in the Executors actual Possession, or not.*
2. *How the Executors Interest in the Testators Goods differs from that which he hath in his own.*
3. *Whether an Executor may by Will bequeath the Goods he hath as Executor.*
4. *Whether the Administrator of an Intestate Executor may intermeddle with the Goods of the first Testator.*
5. *How Testators and Executors are Correlatives as to Chattels.*

1. **I**N Chattels personal the Executor hath such an actual Possession presently upon the Testators death, though never so far distant from him, and without any laying his hands actually on them, as that he may maintain an Action of Trespass against any taking them away or spoiling them, though he or any for him never came near them ; (a) but Chattels Real, as Leases for years, are not in his possession, till himself, or some for him actually enter thereupon. (b) But a Lease for years of Tythes, be the Executor never so far distant from them at the time of the Testators death, shall be in his actual possession instantly upon the setting out thereof, so as he may maintain an Action of Trespass against any that shall take the same so set out, though he, nor any for him did never actually lay their hands thereon. (c) But in Glebe Lands into which Entry may be made, the Case may be otherwise. Nor are debts accounted to be in the Executors hands, till recovered : So likewise Arrears of Rents, yea, of Inheritance behind in the Testators life-time ; for Executors are qualified to receive them also.

2. An Executors Interest, as Executor, is only in his Testators right ; (d) his interest in his own Goods is absolute and proper ; therefore, though the Lord of a Villain might take all the Villains own Goods, yet he might not take the Goods he had as Executor. (e) And from hence some have been of opinion, that an Executor granting all his Goods, these are excepted which he hath as Executor, except the Executor (according to the Lord Dyer) who is the Grantor, be named Executor in the Grant. (f)

3. Nor can the Executor by Will bequeath the Goods he hath as Executor, without a precedent alteration of the Property there-

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of,

(a) Offic. Ex. cap. 10. in prin.

(b) Perk. 6. 1.

(c) A. 5 E. 3. 17. & 21 H. 6. 43.

(d) Cokelib. 9. 88. b. in Pinchon's case.

(e) Littl. tit. Villenage, 41. 42.

(f) Offic. Ex. cap. 7.

(1) *Stylus Regist.*
24

(2) *Brook. Admin.*
7 *Fitz. Adm.* 3.
Plowd. 525.

(3) *Co. 9. Lampet's*
Case, Dyer 167.
Plowd. 516.

(g) *Plowd. Com.*
52. 5. inter
Brantby & Gran-
tham, p. 20 Eliz.

of, and with a Reconveyance thereof back to himself again. Yet it is held, That an Executor of a Term of years may devise it, but the Administrator of a Term cannot. (1) Also the Executor may constitute and appoint an Executor of the first Testator's Goods, which an Administrator cannot do, as to the Goods of an Intestate. But the Executor or Administrator may make a Disposition of the Profits that do arise by the Goods and Chattels either of them hath during the time of his Administration. (2) But neither of them, as such, can devise the Goods and Chattels he hath as Executor or Administrator; because the Goods and Chattels which one hath only in the right of another, are not devisable; only the Executor may make a continuation of the Executorship.

A Devise to an Executor is not in him until his Election: And in case he enter generally, it shall be intended that he takes as Executor, until the contrary be proved. (3)

4. An Executor dying Intestate, his Administrator cannot meddle with those Goods the Intestate Executor had as Executor, but thereof Administration must be granted. As *de Bonis non Administratis*, to the next of Kin of the Intestate Executors Testator. For the reason aforesaid, the Goods which a Man hath as Executor, are not liable for the Executors Debts, and therefore cannot be taken in Execution for his own proper Debts. (g) For the same reason also, the Goods which a Woman hath as Executrix, are not devested out of her into her Husband by Marriage, nor can he have them after her death, without being his wife's Executor. Upon the same ground it is (as was but now hinted) that the Goods and Chattels of the first Testator in the hands of his Executors Executor (no alteration of the property thereof being made by his Executor) shall not be liable for satisfaction of the Debts of his said Executor: As thus, suppose *A.* makes *B.* his Executor, and dies; *B.* makes *C.* his Executor, and dies: Now if *B.* made no alteration of the property of the Goods of *A.* but merely left them to *C.* In this Case the Goods which so came to *B.* as Executor to *A.* and so from *B.* to *C.* shall not be liable in Law to pay the debts of *B.* the immediate Executor of *A.*

5. There is a further discovery of an Executors Interest as to Chattels Real, wherein Testators and Executors are as Correlatives; for if a Man make a Lease for life to one, the Remainder to his Executors for twenty one years, the term of years shall immediately vest in the Lessee, for even as Ancestors and Heirs are Correlatives as to Inheritance; so are Testators and Executors Correlatives, as to Chattels: And therefore if a Lease for life be made to the Testator, the Remainder to his Executors for years, the Chattel shall vest in the Lessee himself, as well as if it had been limited to him and his Executors. And thus a Remainder of years

Limited.

limited to the Executors of a Lessee, shall presently vest in the person of the Lessee himself, because Testators and Executors are Correlatives as to Chattels. Hence also it is, That albeit a Lease for years, next Advowson of a Church, Covenant or Obligation for payment of Money, or the like to be made to *A. B.* and to his Heirs; yet in these and the like Cases, he shall have it as a Chattel, and shall go not to his Heir, though named; but to his Executor, though not named, because of that Correlation between Testators and Executors as to Chattels. (1)

(1) Littl. Sect. 740.
14 H. 4. 24. 34 H. 4.
6. 27 F. N. B. 120.
Brook. Oblig. 18.
68. Fitz. Accomp.
56.

C H A P. XVIII.

Of the Executors right in opposition to the Heirs in reference to Mortgages.

1. *How the Executor doth more represent the person of the Testator, than the Heir doth the person of his Ancestor.*
2. *The difference in point of Payment, whether to the Heir or to the Executor in case of Mortgages.*

1. IF the Feoffee in Mortgage, before the day of payment which should be made to him, make his Executors and die, and his Heir entereth into the Land as he ought; in this Case the Feoffor ought to pay the Money at the day appointed to the Executors, and not to the Heir of the Feoffee; unless the Condition were, that the Feoffor pay to the Feoffee, or to his Heirs such a Sum of Money at such a day. (a) Here note, That the Executors do more represent the person of the Testator, than the Heir doth the person of the Ancestor; for though the Executor be not named, yet the Law appoints him to receive the Money, but not so the Heir, unless he be named. (b) Here also note, That if the Condition upon the Mortgage be to pay the Mortgagee or his Heirs the Money, and before the day of payment the Mortgagee dieth, the Feoffor cannot in this case pay the Money to the Executors of the Mortgagee. (c) But if the Condition be to pay the Money to the Feoffee, his Heirs or Executors, then the Feoffor hath election to pay it either to the Heir or Executors. (d)

(a) Littl. Inst. lib. 3.
cap. 5. Sect. 339.

(b) Coke, *ibid.*

(c) *Ibid.*

(d) *Ibid.*

2. If a Man make a Feoffment in Fee, upon Condition, that the Feoffee shall pay to the Feoffor, his Heirs or Assigns, Twenty pound at such a day, and before the day the Feoffor makes his Executors and dieth, the Feoffee may, as aforesaid, pay the same either to the Heir, or to the Executors, for they are the Feoffors Assigns to this intent: But if a Man make a Feoffment in Fee, upon Condi-

tion,

(e) Coke, *ibid.*

tion, that if the Feoffor pay to the Feoffee, his Heirs or Assigns, Twenty pounds before such a Feast, and before the Feast the Feoffee maketh his Executors and dieth, the Feoffor ought to pay the Money to the Heir, and not to the Executors; for the Executors in this Case are no Assigns in Law. And the reason of this difference is, for that in the first Case the Law must of necessity find out Assigns, because there cannot be any Assigns in Deed; for the Feoffor hath but a bare Condition, and no Estate in the Land which he can assign over; but in the other Case the Feoffee hath an Estate in the Land, which he may assign over: And where there may be Assigns in Deed, the Law shall never seek out or appoint Assigns in Law. (e) So that where Mortgage-money is payable by the Feoffee to the Feoffor, his Heirs or Assigns, and such Feoffor die before the day of payment comes, the Feoffee may pay the Money to the Feoffors Heir, for he is to this intent his Assign, though not exclusively to the Executor, and therefore he may pay it unto either of them, they both being to this intent his Assigns as aforesaid: But in case it be payable not by, but to the Feoffee, his Heirs or Assigns, and not as in the former Case to, but by the Feoffor, and the Feoffee die Testate before the day of payment comes, in this case it is payable to the Feoffees Heir; for he, and not the Executor, is to this purpose his Assign in Law.

C H A P. XIX.

Touching the Executors Election to accept or refuse the Executorship.

1. *Of the Judges power to affix the time for that Election; or in case of the Executors refusal what his power is.*
2. *In what Case a person may be compell'd to accept the Executorship, notwithstanding his judicial refusal.*
3. *How one appointed Executor by the Will may Administer, notwithstanding his refusal to prove the same.*
4. *Cases in Law pertinent to the Premises.*

(a) Boic. Panor. & Bar. in C. Tua nos. Testa. & Plowd. in Cas. int. Greisb. & Fox. Legat in Libertatem de Exec. Testa. & ibi Jo. de Athon. verb. ap. prob. Confu.

1. **H**E that is appointed Executor in a Will, may be summoned to appear before the Judge of the Jurisdiction, to accept or refuse the Executorship. (a) The time wherein he that is named Executor in the Testament, to deliberate and determine whether he will accept or refuse the Executorship, is uncertain, and left to the discretion of the Judge, who hath used at his pleasure

sure, and when he will, not only within the year, but within a month or two to cite him that is named Executor to accept or refuse the Executorship; and upon the non-appearance or refusal of such Executor to prove the Will, the Judge may commit Administration as of an Intestate. (b) And such Administrators power is effectual in Law, until the Executor undertake the Executorship. (c) For then the Judge may revoke such Administration. (d) But if the Judge knowing that there is a Will, grant Administration, not having first called the Executor to accept or refuse the Executorship; the Executor when he shall have proved the Will, may sue such Administrator in an Action of Trespass: (e) Because the Judge hath no power to grant Administration but in case of Intestament, or that the persons named Executors either will not, or cannot be Executors. (f)

2. No Man can be compell'd to accept the Executorship, (g) unless he hath already intermeddled with the Testators Goods as Executor; (h) for then it is too late for him to refuse. (i) Yet if any Legacy be given him in the Will, wherein he is named Executor, he may then be compelled to accept the Executorship, or he shall lose his Legacy. (k) Yea, though he were of Kin, or Allied to the Testator. (l) Yet the Wife shall not lose her thirds, nor the Children their Filial Portions, by refusing the Executorship. (m)

Confil. 235. (l) Ibid. (m) Auth. hoc amplius. C. de Fidei Com. Novel. de hæred. & Falcid. §. si quis autem. Cok. 9. 37. Fitzh. tit. Admin. 6. 11. Bro. tit. Adm. 32. Perk. §. 485. Dyer 160. 21 Ed. 23.

3. Although where an Executor hath Administred, he cannot afterward refuse, because he hath thereby determined his Election; and although where there is an Executor, and he refuse, or many and all refuse, the Party is dead as Intestate, and Administration is to be committed with the Will annexed; yet in case there be divers Executors, viz. A. B. C. and A. only refuse, and the Will be proved by the other two, there A. continueth an Executor, notwithstanding his refusal; (n) so as he may still release Debts of the Testator, and Debts owing by the Testator may be released to him. (o) Yea, if sute be to be had by or against the Executors, it shall not be in the names of B. and C. only, but A. also must be named as a Plaintiff or Defendant, or else the Action may be overthrown. (p) Yea, this Executor which refused may afterwards administer at his pleasure, and intermeddle with the Goods as well as the others; but after their death he cannot so do; (q) for then the Executor of him that proved the Will is only to administer; and the others refusal continuing to the death of his Co-Executor, his power then died also with him; but so long as the one Co-Executor liveth that proved the Will

(b) Brook. Abridg. tit. Admin. nu. 32. & tit. Exec. nu. 49. 10 a. & 31 H. 8 c. 5. (c) Bald. in L. de bere. C. de Fidei Commiss. & Plow. in Cas. int. Greisb. & Fox.

(d) Brook. Abridg. tit. Admin. nu. 33. (e) Abridg. des Cas. tit. Administ.

nu. 2. fol. 183. (f) 21 H. 8. c. 5.

(g) Panor. in C. Jo. de Test. Ext. nu. 3. & Oldend. de Exec. ult. vol. tit. 7. in fin.

(h) Plowd. in Cas. int. Greisb. & Fox. (i) Fitzh. Abridg. tit. Exec. nu. 35.

(k) Gribat. Thel. Com. Opin. verb. Tutor. & Rom.

(l) Ibid. (m) Auth. hoc amplius. C. de Fidei Com. Novel. de hæred. & Falcid. §. si quis autem. Cok. 9. 37. Fitzh. tit. Admin. 6. 11. Bro. tit. Adm. 32. Perk. §. 485. Dyer 160. 21 Ed. 23.

(n) Coke lib. 5. fol. 28.

(o) 22 Ed. 3. 19. & 15 Ed. 3. 8.

(p) 41 Ed. 3. fol. 22. & 21 Ed. 4. fol. 24.

(q) 42 El. Coke 9. fol. 36, 37.

(r) Bro. tit. Ex. nu. Will, the other, though he refused the Executorship before the
 38. Dyer fol. 160. Judge, may yet afterwards, so long as the other lives, administer
 (s) Bro. eod. tit. nu. the Goods, or remit the Debts due to the Testator : (r) And that
 37. & nu. 1. 17. Co-executor that so proved the Will, cannot hinder him, nor can
 Vid. Part 1. cap. he recover against the persons by him so released. (s)
 20. Sect. 6.

Mich. 29 & 30
 Eliz. C. B. *Broker*
 vers. *Charter*.
 Cro Rep. par. 3.

4. Trespafs. It was found by Verdict, That Sir *Ralph Rowlet* being posselt of a Term, made his Last-will, and thereof made the Lord Keeper *Baker*, *Catlin* Chief Justice and others his Executors, and devised the Term to the Lord *Catlin*, and died. All the Executors wrote a Letter to Dr. *Dale* Judge of the Prerogative Court, That they could not intend the Execution of the Will, and desired him to commit the Administration to *Henry Goodyer*, the next Kin of the Testator : The Administration was accordingly granted, but the Register entered the Cause, viz. For that the Executors did defer *suscipere onus Testamenti*. After this, *Catlin* entered upon the Land devised to him, and granted it over ; the doubt was whether this Grant were good : 1. Whether the Letter were a sufficient Renunciation ? 2. Whether (if they once refuse) they may, after Administration granted, Administer at their pleasure ? Dr. *Ford* declared to the Justices, That by the Civil Law a Renouncing may be as well by matter in Fact, as by a Judicial Act, and they may refuse *per parol*, and cited a Rule in the Civil Law, *Non vult esse hæres, qui ad alium vult transferre hæreditatem* ; and, *Hæritas est totum jus quod defunctus habuit*. And to the second matter he said, *Qui semel repudiaverit hæreditatem, amplius hæreditatem petere non potest* ; and, *Qui semel repudiaverit, shall not after be Executor, quia transit in contractum*. And that Executors cannot refuse for one time, but for ever ; but they may pray time to advise or consider of taking upon them the Executorship, and it ought to be granted ; and in that case the Ordinary is to grant in the mean time Letters *ad colligendum, &c.* But is not to grant Administration. And for these Reasons there being a refusal, the Grant made after Administration committed, was void ; and so was the opinion of the Court.

Hill. 31 Eliz. *Beau-*
serne vers. *Carter*.
 Mor. Rep. nu. 426.

If all the Executors write a Letter to the Ordinary, desiring him to commit Administration, for that they cannot attend the Execution of the Executorship or the Will, it is such a refusal, as that they cannot afterwards Administer.

Although where one of divers Joynt-Executors refusing to prove the Will, may yet at any time during the life of any one of the Co-Executors, Administer to the Will ; yet if at any time an Executor, albeit he be sole Executor, shall administer, it will be such a Determination of his Election, as shall exclude his future refusal, yea, though Administration were granted to another. To this purpose was that Case where Debt against an Executor for Rent reserved

reserved upon a Lease for years made to the Testator : The Defendant pleaded, *Fully Administred* ; and upon the Evidence it appeared, That *A.* made the Defendant his Executor, who meddled with the possession of divers Goods of the Testator, and so administered, and yet afterwards refused in Court. Whereupon Administration was afterwards committed to *B.* and the Inventory of the Testators Goods came to One thousand pound : It was given in evidence for the Defendant, That he himself had paid certain debts ; and that divers persons had recovered against the Administrator, divers Sums of Money amounting to One thousand pound, & *ultra*, &c. It was moved, Whether that Evidence did maintain the Issue for the Defendant, because he had pleaded, *Plene Administrait* ? It was said by *Periam* Justice, That if an Administrator (who is in truth but a Stranger) pay any debts with the Goods of the Testator, without Commandment of the Executor, the same is not Administration, and the Executor cannot give such matter in evidence to prove his Plea of, *Fully Administred*. And here in this Case, the Defendant is the very Executor, and he hath Administred : In which Case he cannot afterwards refuse : And so the Administration is not well committed, and the Administrator was a stranger ; and what he did was without sufficient warrant, and therefore it is no Administration to prove the Issue : But it was agreed by him, That in this Case an Action might be brought either against the Executor of his own wrong, or against the Administrator, but not against them both jointly. (1)

(1) Trin. 32 Eliz.
C. B. *Hawkins* and
Lawse's Case.
Leon. 155.

C H A P. XX.

Touching what Acts may or may not be done by an Executor as well before as after Probate of the Will.

1. *An Executor may, before Probate of the Will, enter into the House of the Heir to seize on the Testators Goods, and assent to Legacies.*
2. *A Limitation or Qualification of that Power.*
3. *In what Case payment must be made by, or to an Executor, though no Will yet proved by him.*
4. *What Actions an Executor before Probate of the Will, may or may not maintain.*
5. *An Executor may, before Probate of the Will, make an Inventory of the Testators Goods and Chattels.*
6. *Several other things which an Executor may do before he hath proved the Will.*
7. *An Executor may retain the Testators Goods to satisfy his own Debt.*
8. *Of Executors assent to a Legacy, and how it may be by Implication and Act in Law, as well as by express words.*

1. **T**HE power of an Executor dependeth wholly upon the Will and Designment of the Testator. Now an Executor may, before his proving of the Will, seize and take into his hands any of the Testators Goods; yea, enter into the House of the Heir, if not locked, so to do, and to take the Specialities of Debts; and generally, he may do all things which to the Office of an Executor pertaineth, except only bringing of Actions, and Prosecution of Suits; (a) for they cannot sue till they have the Will under the Seal of the Probate-Office. But he may, before Probate of the Will, receive and pay Debts, pay Legacies, enter into and seize on the Personal Estate and Chattels of the Testator, and do most other Acts as an Executor, only he cannot (as aforesaid) before Probate of the Will, sue for any Debt due to the Testator.
- (a) *Office Ex. c. 3. §. 1. & 9 Ed. 3. f. 33. 47. & 7 H. 4. 18.*
- (1) *Co. on Lit. 292. Perk. Sect. 481.* (1) And as he may, before Probate, pay Legacies: so also, before Probate, he may assent to the delivery of a Legacy, or assent that the Legatee do take or receive his Legacy: Which assent to make the Devise good, may be by any Agreement either by word or deed. (2) And it seems, That whatever words or verbal Agreement will be a good Attornment in Law, may make a good assent to a Legacy; if therefore the Legacy be agreed unto by the Executor upon certain Terms and Conditions, this will be
- (2) *Co. 4. 28.*

be a sufficient *assent* in the Executor to perfect the Legacy. (3) (3) Per 2 Just. M. 37. 38 Eliz. And an *assent* to the first *Devisee*, is an *assent* to him in Remainder. (4) B. R. Co 4. 28. (4) March. 37.

2. Although an Executor may, after the Testator's death, enter into the house where he lived and died, and where his Goods are; and thence take them away even before Probate of the Testament, yet understand it with this caution, That he must do this within convenient and reasonable time, as within or about thirty days next after the Testator's death; and that also in a due and peaceable manner, when the doors are open. (b) (b) Littl. Sect. 69. Plowd. 281. Bro. tit. Execut. 129.

3. An Executor may also before Probate of the Will pay Debts and receive Debts, and make Acquittances of Debts owing to the Testator: Yea, if before such proving of the Will, the day be come for payment upon Bond made by or to the Testator, payment must be made by or to his Executor, though the Will be not yet proved, and that upon like pain of forfeiture, as if the Will were proved. (c) Also an Executor may before Probate give or sell any of the Goods and Chattels of the Testator, not other wife bequeathed in the Will, and for the same may maintain his Action. (c) Offic. Ex. ubi sup. Coke 6. 18. 9. 38. 5. 27. Plowd. 280. 9 Edw. 4. 47. 36 H. 6. 7. Fitzh. tit. Admin. 2. 6. & Brow. 1 part. 76, 77. 73. 53.

4. For an Executor for Goods of the Testator taken from him, or for a Trespass done upon the Lease-Lands, or for a distraining or impounding of the Goods or Cattel, may maintain Actions of Trespass or Replevin, or Detinue, even before the Will be proved, because these Actions arise out of the Executors own possession. (d) But an Action of Debt, or the like, contracted by the Testator, he cannot maintain, before the Will be proved, for therein he must shew forth the Will proved under the Court-Seal. And as at the Common Law, If a man be bound to another in a certain sum of Money, to pay at a certain day, and the Obligee before the said day, release unto the Obligor all Actions, he is barred of the duty for ever, though he could not have an Action at the time of the Release made; even so may an Executor before Probate of the Testament, release an Action. (e) And the reason of both is, because the right of Action is in them, for that the Debt is a thing consisting meerly in Action; and therefore though no Action as yet then lieth for the Debt, yet because the right of Action is in them, the Release of all Actions is a discharge of the Debt it self. (d) Dyer in Plow Com. 281. *Case of Greisbr. & Fox.* (e) Trin. 2 Jac. in Com. Ban. inter Middleton & Rimot. 18 H. 6. 23 b. Pl. Com. 277. 278. in *Greisbrooks Case*, per Weston vid. Coke, lib. 3. cap. 8. Sect. 512.

5. Another thing that an Executor may do before the proving of the Will, and which is expedient for him, though as yet not so necessary, is the making of an Inventory; for the Executor had need be cautious that he do not intermeddle with, or Administer the Testators Goods, until he hath made an Inventory; for although the act of an Executor is said to hold in Law before

(f) Plowd. in
Cas. inter Greis-
brook & Fox.

(g) Lynwood in-
ventarium. tit. de
Testa. lib. 3.

Const. Prov.

Cant. verb. prius.

(h) Legat. in Li-
bertatem de Exe-
cut. Testam.

(i) Jo. de Artho.

in dict. Legat in

Libertatem. verb.

inventarium.

dict. C. Statut. §.

inhibemus. In

Text. & in Glos.

(k) Dyer 2.

the proving of the VWill, (f) and the making of an Inventory; (g) yet for intermeddling with the Testators Goods as Executor, before he hath made an Inventory, or caused the same to be made, though not exhibited, he was according to Law punishable; (h) unless it were for doing such things as could not conveniently be deferred till the Inventory were made, as concerning things relating to the Funerals, or disposing such things as *Servando servari non possint*, and such like. (i) Besides, if he make not an Inventory and yet Administer, he may be compelled to discharge out of his own purse more Debts and Legacies than happily the Testators Goods and Chattels did amount to.

6. There are several other things which an Executor may do before he hath proved the VWill, and he may also keep any of the Goods of the Testator, so as he pay out of his own money the value thereof in Administration of the Testators Estate; (k) he may also if he want Money to pay Funerals, or discharge Debts, sell any of the Chattels Real or Personal, whereof the Testator died possessed, yea, though that thing were particularly bequeathed. As if a man be possessed of a Term of years, and bequeath the same to A. B. the Executor may notwithstanding the bequest at any time before his assent given to the Legacy, if he have not Assets sufficient to pay the Debts, sell this Term of years, and the Legatee is remediless. So also he may do, although there be Assets enough besides to pay the Debts; but in such Case the Legatee may not be without all relief in a Court of Equity against the Executor as to damages, but the sale is unavoidable. (l)

(l) Plowd. 543,
544.

Lessee for years devised his Term to one whom he made his Executor, and died: The Devisee entred before any Probate of the Will, and held and enjoyed the Land for a Year and more, without proving of the Will, and then died; it was a Question, Whether his Executor, or in Case he died Intestate, his Administrator should have the Term? It was the opinion of the Court, That the Term was lawfully settled in the Executor by his Entry; and it was a good Execution of the Devise, without any Probate made of the Will. *Mich. 22 Eliz. Dyer 367.*

*Mich. 1652. B.R.
Long & Hobbs
Case. Stiles 341.*

Letters of Administration do relate to the time of the death of the Intestate, and not to the time of the granting of them; and therefore an Administrator may have an Action of Trespass, or a Trover and Conversion for Goods, taken by one before the Letters granted to him; otherwise there would be no remedy of the wrong done.

*Pasch. 42 Eliz.
Anderf. Rep. par.
Case 83.*

Executors took the Testators Goods before they had proved the Will; another took Letters of Administration, and takes the Goods out of the Executors hands before the Will was proved: The Executors bring their Action of Trespass against him who took

took the Goods, the Court held that it did well lie; for after the Testators death the Goods belong to the Executors, and to none other; and an Administration to intermeddle with these Goods is utterly void; for that they have nothing to do with those Goods as Administrator, when there is an Executor.

7. An Executor may retain Goods in satisfaction of a Debt due to him from the Testator, and the Retainer shall be held good. (m) Action of Debt was brought against the Executors of A. B. who pleaded that they had fully Administred; the Plaintiff gave Evidence that they had Goods in their hands; the Defendant shewed, that the Goods were pledged by their Testator, and that they had redeemed them with their own money to the full value; and that for the rest of the Goods, that they had paid to the Testator as much for them as they were worth: It was holden, That the same did well maintain their Issue of *Fully Administred*; for that an Executor shall by w.y of Retainer be recompenced that which he hath paid. (n) But an Executor of his own wrong cannot retain Goods but they shall be Assets in his hands. (o) The like we have in another Case. Two men were possessed of Goods as Executors; the one of them took the goods into his hands, and disposed of divers sums of money in *Pious usus, & pro anima Testatoris*; which sums did amount to more than the Goods of the Testator were worth, and he did retain the Testators Goods as his own proper Goods, converting the same to his own use, whereof he died possessed, after he had made his Will, and therein Executors. The surviving Executor brought *Detinue* of the said Goods against the Executor to the value of One hundred pound, upon which the Defendant pleaded the matter *Supra*. It was adjudged, That the Retainer was lawful; and that those Goods now in the hands of the Executors, were not Assets or Goods of the first Testator in the Executors hands. (p) Or suppose a Testator be indebted to a man by Bond in Twenty pound, if his Executors make a sufficient Obligation to the Testators Creditor, and sufficiently discharge the Testator, without fraud or covin, they may retain the Goods for so much, and the Goods retained shall not be Assets in their hands, yea, though they have appointed *ulteriorem diem* for the payment of the money. (q)

S. brought Debt against S. as Executor to B. who pleaded *Fully Administred, &c.* to which the Plaintiff replied, That he had Goods of the Testators to the value of Two hundred Marks, which the other confess'd and gave in Evidence, that he had paid as much of his own proper money for the Testators Debts, and shew'd how: The Judges doubted whether he could give the matter in Evidence, and desired the Opinion of the Justices of

(m) Plow. Com
184.

(n) 6. H. 8. Dyer
2. 20 H. 7. Kell-
way 58.

(o) Coke. 5. part.
30. *Counter's Case*.

(p) Mich. 2. Eliz.
Dyer, 187.

(q) Pasch. 30. El.
in C. B. *Stamp &
Hutchin's Case*.

Leon. 111, 112.

Shelley vers.
Shackville. Anderf.
Rep. par. 1. *Case*
50. vid. 20 H. 7.
fol. 2. 4, 5.
M. 6 E. 6.

B. R. thereon, who held, That he might give it in Evidence ; whereupon the Justices proceeded accordingly : For it was agreed, *Hill. 10 H. 8.* That the Property of the deceased's Goods by payment of the Testators Debts to the value of the said Goods retained, to the amount in value was altered, and the Property being altered to the use of the deceased, is a just Administration.

8. If a Term of years be devised by a Testator to his Wife, during the minority of his eldest Son, for the Education of his Children, with the profits thereof, the Remainder to that eldest Son, and she being made Executrix, do enter generally, but always breeds up the Testators Children : In this Case, it seems, such Education of the Testators Children shall be taken as an *assent* against her, to vest the Estate in the Eldest Son. (5) Or if the Term be devised to her, if she so long live, the Remainder of years, after her Decease, to A. B. and she made Executrix, enter claiming it only for her life, the Remainder to A. B. according to the Devise : This will be a sufficient *assent* in the Wife as Executrix for the Execution of the Devise of the Remainder of the Term in A. B. (6)

(5) *Plow. 540.*

(6) *Plow. 516.*
Perk. Sect. 574.

The Devisee in Remainder need not (as aforesaid) any special *assent*, if there were an *assent* by the Executor to the first Devisee. And therefore if there be a Devise of a Remainder to B. after a Term devised to A. for life, an *assent* of the Executor to A. is good to B. also, and this will be an Execution of the Devise to B.

(7) *Co. 4. 66. 8.*
95. 10. 47. Perk.
Sect. 574.

as well as to A. whether the Executor hath *Assets* or not. (7.) The Law is the same in the case of two *Devisees* of a Term of years, whereof the one for a part of the Term, the other in remainder for the residue of the Term, the Executors *assent* to the first, is an *assent* to the other also. This Law may hold in the case of a Legacy of *Personal Chattels*, whereof the *Occupation* or *Use* only is bequeathed to one, then the *thing* itself to another. (8) Yea,

(8) *37 H. 6. 30.*

where a Term of Years of Land is devised by a Man to his Wife for her Life, the Remainder to his Son, and she made Executrix, and enter, if she claim not as *Executrix*, but as *Devisee*, and by force only of the Devise, this act of hers will be a good *assent* in Law, to execute the Devise to the Son in Remainder. (9)

(9) *Plow. 519.*
543. Co. 3. 96.
10. 47.

It is a truth, than an Executor by his *assent* cannot alter the nature, quality or condition of a Legacy or Devise ; and it is agreed, That an Executor may give only a *conditional assent*, or assent only upon condition : But the reason in Law, why or wherefore an Executor may not *assent* to a Legacy upon a *Condition* subsequent as well as upon a *Condition* precedent, that is, *subsequent* or *precedent*, not in respect of the time of the Legatees performance thereof, but in reference to the subject matter of the thing to be performed for the advantage of the Testators interest : The reason, I say, in Law for this, seems somewhat Obscure. (10)

(10) *Co. 4. 29.*

In this point of *assent* in Executors or Administrators requisite to the due Execution of a Legacy or Devise, the Law puts some difference between a Devise of a Term of years, and a Legacy of *personal Chattels*: For though the Devisee in Remainder of a Term shall take the advantage of an express or implicit *assent* to the first Devisee, yet in some cases it seems otherwise in the Case of *Personal Chattel-Legataries*: Insomuch, that albeit a Testator devising a Term of years of Land to one of his Executors alone for some part of the time, the Remainder thereof after to a stranger, and this Executor alone, albeit he enter generally, doth occupy the Land himself, the other Executors not intermeddling therewith; in which case, this will be a good *assent* to execute the said Devise to him in *Remainder* for the residue of the Term; yet if a Testator bequeath any *Personal Chattels* to one of his Executors to use and occupy during his life, and after to a stranger for his life, and this Executor alone get such *Personal Chattels* into his own hands, and occupy them alone during all his life-time: This Occupation alone by such Legatary-Executor will not of it self, it seems, without some assent, perfect or execute the Bequest of the second Legatee in Remainder. (11) And yet if he were a (11) Perk. Sect. stranger, and not an Executor, to whom the use or occupation of 574. Fitz Devise. 6. a Personal Chattel is first bequeathed, it may be otherwise: For if one bequeath the use or occupation of any personal Chattel to *A. B.* during his life, and that after his decease it shall go to *C. D.* for ever: And the Executor deliver that personal Chattel to *A. B.* it seems, that this will be a good Execution of the Legacy to *C. D.* the second Legatee; insomuch, that after the death of *A. B.* he may seize, keep and hold it according to the Testator's Will. --- *Old. N. B.* 80. 37 *H. 6.* 30.

An *assent* to a Legacy, so as to bind the Executor or others, cannot be given by one, either under the age of seventeen years, or under Coverture, without her Husband's *assent*, which is sufficient to bind them both. (12)

The occupation or profits of Land being devised by a Termor to *A. B.* for part of his Term, and after the Land it self devised by him to *C. D.* for the residue of the Term; in this case the Executor's *assent* to the Devise of *A. B.* will well execute the Devise to *C. D.* (13)

If a Term be devised to *A. B.* for his life, the Remainder to *F. G.* and *A. B.* be made Executor, and take a Release from *F. G.* of all his right to the Land; such Release is a good implicit *assent* to the Devise of *F. G.* (14)

(12) Hill. 9. Jac.
B. R. *Retorick &*
Chappel's Case.

(13) Plow. 540.
544. Co. 8. 96.
Plow. 522.

(14) Co. 10. 52.
More. Case 1106.

C H A P. XXI.

Of Inventories.

1. *What an Inventory is, and the Original thereof.*
2. *Within what time an Inventory is to be made and exhibited.*
3. *The manner how, and reason why an Inventory is to be made.*
4. *What ought to be inserted into the Inventory, and what not.*
5. *A Case in Law to this purpose.*

1. **A**N Inventory is a Description or Repertory orderly made of the Goods and Chattels of a person deceased, valued and appraised by four indifferent and credible persons or more, experienced in such affair, and of the Neighbourhood to the deceased : Which Inventory every Executor or Administrator ought to exhibit to the Ordinary, at such times as he shall appoint. (a) This Inventory proceedeth from the Civil Law; for whereas by the ancient Law of the Romans, the Heir was obliged to answer all the Testators Debts, whereby Inheritances or Heritages did often become to many persons rather prejudicial, than profitable or advantageous. The Emperor *Justinian*, the more to encourage persons to assume and take upon them this charitable Office, ordained, that if the Heir would first make and exhibit a just and true Inventory of all the Testators substance coming to his hands he should then be no further charged, than to the value of the Inventory. (b)
2. The time appointed for the making of an Inventory, and for exhibiting the same, is left to the discretion of the Judge; (c) which he is to regulate according to the circumstances of Place, Person, Goods, &c. (d) Yet regularly the Inventory ought to be begun by the Executor within thirty days next after the Testator's death, or his notice of being made Executor, and to be finished within thirty days more after that, or within a year, if the Goods be remote, else he may be charged for the whole Debt. (e) Yet how exactly true this is, may well be questioned. For by the express Letter of the Law, the making of the Inventory is to be begun within thirty days next after the Aperture or opening of the Testament, and notice thereof to the party therein made Executor, of such his Executorship, and to be finished within sixty days more next after that, unless the said Executor and the Testators Goods, or the greatest part thereof, be at that time far remote each from other : In which case the Law doth allow one year from the time of the Testators death for the making thereof. (1) During which time of three months in the one case, or one year in the other, the
- (a) West. Symb. par. 1. lib. 2 Sect. 696.
- (b) L. ult. C. de jure Deliberand.
- (c) Text. in C. Statut. §. Inventarium, tit. de Testa. lib. 3. Prov. Const.
- (d) Lynw. in C. Statut. verb. Arbitrio.
- (e) Gazal. verb. Inventarium.
- (1) §. Sin aurem dubius & §. donec tamen. l. ult. C. de jure Deliber.

Law will not permit any Creditor or Legatary to commence any (2) *Dict. §. do-*
 Action against the Executor. (2) It is notwithstanding doubtful *nec ramen.*
 whether the said three months shall commence from the time the
 Executor accepts the Executorship or immediately from the time of (3) *Guid. Pap.*
 the Testators death: And herein the DD. seem to be much divi- *q. 571.*
 ded in their opinions, the former is said to be the more received o- (4) *Constat ex*
 pinion, (3) but the latter seems to come nighest to the truth. (4) *dict. §. fin autem*
 And albeit it ought to be begun within the thirty days, yet it is not *dubius.*
 invalid, though it be begun afterwards, so as it be finished within (5) *Didac.*
 the three months; (5) which precise Term will notwithstanding *Spino. in Spec.*
 admit of a Prorogation upon a just & reasonable cause, as aforesaid. (6) *Testa. tit. de*
 (6) *Pap. Notar. 3. lib. 9. tit. Des Lettres de benefice d' Inventaire. vers. Poutra.*
Confect. Invent. nu. 26.

3. The Executor in making of an Inventory, ought to call two
 at least of the Testators Creditors or Legataries, or upon their re-
 fusall or absence, two other honest persons, and in their presence
 shall make a true and perfect Inventory of all the Testators Goods,
 Chattels and Credits; and the same shall be indented, whereof
 one part shall be by the said Executor upon his Oath for the truth
 thereof left in the Registry of the Court, the other part to remain
 with himself. In which Inventory, the Testators Goods and
 Chattels are particularly to be valued and appraised at their true
 and just value. And all such Goods and Chattels as are contained
 in the Inventory, are presumed to have belonged to the Testator,
 and now to the Executor, and no more. Therefore if a Creditor
 or Legatary affirm, that the Testator had at his death more Goods
 than are comprized in the Inventory, he must prove the same; for
 such an Inventory by the Civil Law cannot be disproved, unless
 the number of the Witneses be twice as many in number as they
 which do prove it; (f) And if the Executors or Administrators (f) *Fulb. Paral.*
 do make a true Inventory, they shall not be charged further with *2. part. 3. Dial.*
 any Debts than the Goods of the Testator or Intestate will ex- *fol. 32.*
 tend. But if the Executor enter upon the Testators Goods with-
 out making an Inventory, then the Presumption of Law will be
 against the Executor, that he hath Goods sufficient, not only to
 pay the Debts, but all the Legacies also: So that the reason is
 evident; wherefore an Inventory is to be made, *viz.* lest the Exe-
 cutor, if otherwise than honestly disposed, should defraud the Cre-
 ditors or Legataries, by concealing the Testators Goods. (g) There-
 fore such as have interest, whether Creditors or Legataries, ought
 to be called to see the making thereof, otherwise it may be void
 in Law, (7) at least as to such of them as had not any notice there-
 of; (8) which ought also to be made in the presence of two or
 (8) *Guid. Pap. Pap. de Form. Invent. Anto. Faber in suo Codic. lib. 6.*
 & *Did. Spiro. & Tepar. & aliis.*

(g) *Fran. Pareel.*
in Tract. de In-
ventorio. q. 2. §.
De Hæred. H. &
Fall. in Auth.
 (7) *Menoch. l. r.*
Confil. 69. nu.
138. Pet. Greg.
lib. 46. c. 3. nu. 9.
 (8) *tit. 11. Def. 37.*

(9) Pap. ibid. & Dilectus de art. Testan. tit. 11. Caut. 8.
 (10) Tapat. & Dilect. ubi supra.
 (11) Dilect. & Pet. Greg. ubi supra
 (12) Dilectur. & Guid. Pap. ubi supra.

(h) 21 H. 8. c. 5.
 (i) *Terms of Law*,
 verb. *Chattels*,
 quæ sunt Cat.
 Re.

(k) Perk. tit.
 Devise, fol. 99.

(l) Perk. ibid.

(m) Coke Rep.
 lib. 4. in *Herlakens
 Case* in fin.
 fol. 63, 64.

(n) Kelw. Rep.
 fol. 88. nu. 2.

L'abridg. dez
 Cas. tit. Exec.
 fol. 181. nu. 4.

(o) Ibidem.

(p) L. hac lege, &
 l. fin. C. de Pact.
 conven. sup. Dot.

(q) L. ob marito-
 rum. Cod. Ne
 uxor pro marito.

(r) Dist. Stat.
 21 H. 8. c. 5.

(s) Gloss. in l.
 Chirographus.
 ff. de Adm. Tuto.

(t) St. H. 8. ubi
 supra.

(13) Anto. Faber.
 in suo Codice, l. 6.
 tit. 11. Def. 25.
 & Escobar. Tract.
 de Ratiocin. c. 9.
 nu. 67.

three credible Witnesses at least. (9) Nor is it sufficient that they see the writing of the Inventory, but the things inventoried ought to be produced and exhibited in their presence, (10) And in case the Creditors or Legataries be absent, then there ought to be (beside the said Witnesses) three persons of good quality and integrity present at the making thereof, (11) which ought to be subscribed by the Executor. (12)

4. Generally all the Goods and Chattels whereof the Testator died rightly possessed (some certain things for special Reasons and Legal Reservations only excepted) ought to be put into the Inventory; (b) and therefore Leases are not exempted: (i) Also Corn growing on the ground is to be put into the Inventory, because it belongs on the Executor: (k) But not Grass or Trees so growing, which belongs to the Heir; (l) nor Glass windows, nor Wainfcot; (m) nor Tables Dormant, nor Mangers, nor any thing affixed any way to the Freehold; (n) nor the Box or Chest containing the Evidences of the Land; nor Doors, Locks or Keys, nor Filhes in the Pond, nor Doves in Dove-houses situate in Lands belonging to the Heir: (o) Nor *Bona Paraphernalia*, that is, the Wives convenient Apparel suitable to her Degree; (p) for as they are not to be put into the Inventory of her Husbands Goods, so neither are they liable to the payment of his Debts: (q) But the Wives Jewels, Chains, and Borders, and other rich Ornaments of her person, are to be put into the Inventory of her deceased Husbands Goods. (r) Also Debts due to the Testator, are to be put into the Inventory: (s) But moneys raised upon Lands given by the Testator for the payment of Debts or Legacies are not to be inserted into the Inventory. (t) Likewise all Householdstuff is to be put into the Inventory; under which word are comprized Tables, Stools, Forms, Chairs, Carpets, Hangings, Beds, Bedding, Linnen, Bason with Ewers, Candlesticks, with all sorts of Domestick Vessels, whether of Earth, Wood, Glass, Brass or Fewter; yea, Apparel, Books, Weapons, Tools, Cattel of all kind, Victuals, Corn and Grain of all sorts, Wains, CARRS, Plow-gear, Coaches; (though no Household-stuff) also Plate and Jewels; and generally all things not affixed to the Freehold, but coming to the Executor, and not descending to the Heir, are to be inventoried; but such things as are affixed to, and so become part and parcel of the Freehold, and all things that descend to the Heir, and come not to the Executor, are to be exempted out of the Inventory. And here note, That the Civil Law is very exact in this point of Inventories, which will not hold the same as good in Law, unless the Executor doth clearly and distinctly describe therein all the Testators Goods by weight, number, measure, quantity and quality. (13) Some doubt there is in that Law touching

touching the Valuation or Estimate of such Goods; as, Whether it be necessary to appraise the same, and insert the values thereof in the Inventory, or not: Such as hold the Affirmative, (14) do hold withal, That the Creditors, in case they find the Goods undervalued, are admissible to appraise the same, and to take them in that value, unless the Executor will have and retain them at the same price so valued by the Creditors, and at that rate be accountable to the Creditors and Legataries accordingly: (15) But the Negative seems in that Law to be the more prevailing opinion, (16) contrary to the practice with us, which ever inserts the values, though they be not concludent nor definitively obliging: For where they are too high, it shall not prejudice the Executor, nor shall it advantage him, where they are too low; but the just and true value upon an Inquest found by Jury, that alone shall conclude him as to Assets or not, in respect of Creditors and Legataries.

5. The Lady C. was possessor of divers Leases, and conveyed them in Trust, and afterwards married with A. B. the Lady received the Money upon the Leases, and with part of the Money she bought Jewels, and other part of the Money she left, and died: A. B. took Letters of Administration of the Goods of his Wife, and in a Suit in the Ecclesiastical Court, the Court would have compelled him to have given an account of the Jewels, and for the Money, to have put them into the Inventory: But the Opinion of the whole Court of B. R. was, That he should not put them into the Inventory, because the property of the Jewels was absolutely in him as Husband, and he had them not as Administrator; but of such things as be in Action, as he shall have as Administrator, he shall be accountable for, and they shall be put into the Inventory: And for the Monies received upon trust, it was resolved, that the same was the Monies of the Trustees, and the Wife had no remedy for it, but in Equity, and therefore the Husband should have it as Administrator: And in that Case it was resolved, That if a Woman do convey a Lease in Trust for her use, and afterwards marrieth, that in such case it lies not in the power of the Husband to dispose of it: And if the Wife die, the Husband shall not have it, but the Executor of the Wife. (u)

(14) Bart. in lult. de Magist. conve. & Salicet. in l. ult. Cod. de jur. delib. Escobat ubi sup. & nu. 78 Pap. Notar. 3. lib. 9. tit. ubi supra. vers. Sans les, &c. & vers. Doit le, &c. Arrestor. l. 2. tit. 10. Arrest. 6. (15) Glo. in dict. l. ult. verb. quantitatatem. Did. Spinno. in Spec. Testa. tit. de Confec. Invent. nu. 35.

(16) Alvar Valascus Tract. de Praxi partitionum & colat. cap. 8. nu. 9.

(u) Trin. 15 Car. in B. R. Sir John S. John's Case.

CHAP. XXII.

Of Actions maintainable by Executors or Administrators.

1. *The several kinds of Actions maintainable by Executors.*
2. *An Action personal in the Testator, is none in the Executor.*
3. *An Executor may sue for Rents, and the Arrearages thereof; yea, in some cases, where the Testator himself could not.*
4. *An Executor Out-lawed or attainted, may yet have action.*
5. *In what Case one Co-Executor may sue another.*
6. *In what Court Executors ought to sue.*
7. *Cases in Law touching this Subject.*

1. **R**EGULARLY Executors may charge all others for any Debt or Duty due to the Testator, as the Testator himself might have done; and the same Actions that the Testator himself might have had, the same, for the most part, may Executors have also: (a) And therefore Executors may have Actions of Accompt, Actions of Trespass *de Bonis asportatis in vita Testatoris*, Actions of Debt against Gaolers upon escape of Prisoners, Writs of Error upon the Statute of 27 Eliz. Attaints upon the Stat. of 23 H. 8. Writs of Restitution upon the Stat. of 21 H. 8. An *Indemnitate Nominis*, when the Testators Goods are taken upon an Outlawry against another Man of his name: Actions of Covenant, for breach of a Covenant made to the Testator; Actions upon the Case upon the *Trover* and *Conversion* of the Testators Goods; an *Ejectione firmæ* for an Ejectment of the Testator out of a Term; an Action of Debt for Rent behind in the Testators life-time; also an Action of debt for the Arrearages of an Annuity due to the Testator in his life. (b) Likewise an Executor for Goods taken from him that belonged to the Testator, or for a Trespass done upon the Lease-Lands, or a distraining, or an impounding of Goods or Chattel, may maintain Actions of Trespass, or Replevin, or Detinue, even before the Will be proved. (c) The reason in Law is, because such Actions do arise from things that were in the Executors own possession: But of a debt, or the like, due to the Testator, his Executor can commence or maintain no Suit or Action before the Probate of the Will.

(a) Sheph. Epit.
cap. 115.

(b) March 329. 13.
Pl. 13.
Plowd. 181. Coke
31. 90
West. 2. cap. 22.
F. N. B. 117.
Dyer 322. Coke
31. 41. & 6. 80.
& 9. 86. Stat. 9 H. 6.
cap. 4. Brook. tit.
Exec. 5. Cok. 5.
27. Stat. 7 H. 4. c. 6.
Cok. 4. 50. Brook. tit. Exec. 169. & 122. Coke 9. 85. Action. Dyer 144. 322. 69. Stat. 12 H. 8. c. 10.
& Brownl. 1 Part, 101. (c) Dyer, in Pl. Com. 181. *Case of Greisbrook and Fox.*

2. But an Executor shall not have an Action for a personal Wrong done to the Testator, when the Wrong done to his person, or that which is his, is of that nature as for which damages only are to be recovered; and therefore an Executor can bring no Action for the beating or wounding the Testator, or for a Trespass done to him in his Cattel, Grass or Corn, or for a Waste by his Tenant done in his Lands; for all these are but personal Actions, and die with the Testators person. (d) But he may maintain an Action for any Contract made to the Testator or Intestate, for any thing which ariseth *ex Contractu*: (1) As also for Money payable upon sale made by himself, before Probate, of any of his Testators Goods: In which Case, as also in Trespases on the Testator Goods, but done to the Executor, he may, without naming himself Executor, maintain Actions before Probate. (d) Sheph. Ep. ubi sup. (1) Buist. l. 13. March 9.

3. If one grant a Rent out of his Land for life, provided that it shall not charge his person, and the Rent be behind, and the Grantee dieth; in this Case the Grantees Executor may have an Action of debt for those Arrearages, and may charge the person of the Grantor. (e) Likewise if any Rent or Arrearages of Rent be due to one upon a Grant of Rent out of any Land to him, or reservation of Rent upon any Estate made by him of Land; in these Cases his Executor may have an Action of debt for this Rent, or he may distrain for it, so long as the Land chargeable with the Rent, and out of which it doth issue, is in his possession that ought to pay it, or any claiming by or under him. (f) Yea, an Executor in some Cases may have his remedy by Action, for the Arrearages of Rent which the Testator himself in his life-time could not; for if a Man grant a Rent-charge out of certain Lands to another for life, with a *Proviso* in the Deed, that the Grantee shall not in any sort charge the person of the Grantor generally, and the Rent be behind, the Grantee dieth, the Executors of the Grantee shall have an Action of debt against the Grantor, and charge his person for the Arrearages in the life of the Grantee, notwithstanding that *Proviso*, because the Executors have no other remedy against the Grantor for the Arrearages; for distrain they cannot, because the Estate in the Rent is determined, and the *Proviso* cannot leave the Executors without remedy. (g) So that the word [*Proviso*] in this Case, doth work only a Qualification or Limitation, not a Condition or a Covenant. (e) Coke sup. Littl. 146. Co. 6. 41. 7. 31. (f) Co. 4. 50. & 32 H. 3. cap. 37. Note, That in all Cases and Actions brought by Executors as Executors, the Writ shall be in the Detinet tantum, although the duty doth accrue in his own time; because the thing recovered shall be Assets. And so it was adjudged Pasch. 7. Jac. in B. R. in the Lord Rich and Frank's Case, & 43 Eliz. in B. R. in Spark's Case.

4. One that is Out-lawed or Attainted in his own person, may yet sue as Executor, because his Suit is in anothers right, *viz.* the Testators. (h) But he that is Excommunicate cannot proceed in suit as Executor; yet this Excommunication pleaded, doth not abate or overthrow the Suit, but makes that the Defendant may stay from answering his Suit, until the Plaintiff be absolved and

(g) 6 Eliz. Dyer, 227. & Cok. sup. Littl. l. 2. c. 12. Sect. 220.

(h) 21 H. 6. 30. & 21 H. 4. 49. 69. & 42 Ed. 3. 13. 14 H. 6. 14. 15.

(i) 3 H. 6. 40. Litt. discharged from his Excommunication. (i) If an Executor Out-lawed hath Goods of the Testator, they are not forfeited by the 44. Cok. 8. 69. 11 R. 2. Excom. 25. Out-lawry; for they are the Testators Goods only in the Executors custody, 21 H. 6. 30. Nor shall an Executor forfeit the Goods of the Testator by an Attainder, 21 E. 4. 50. Goods in the hands of an Executor are the Testators Goods, for his benefit, not for his prejudice, 17 E. 3. 26. 3 H. 4. 13. 20 E. 3. 31. 3 E. 4. 13. If a Villain be Executor and dies, the Lord cannot seize the Goods in the hands of the Executor, because it is to the Testators prejudice, 24 H. 6. 14. The Executor is seized thereof to the Testators use, and not to his own proper use: And it is said, that an Executor is as an Attorney for the dead. (1)

(1) Hill. 12 Jac. B. R. Roy *vers.* Hanger. Roll. Rep.

5. Although one Co-Executor cannot sue another for possession of the Testators Goods, for that many Executors to the same Testator are but as one Man, and no Man can sue himself: (k) So that when the Testator doth make divers Executors, if any one of them doth get the Goods, or the possession of the Goods of the Testator, the other Executor hath no Action for recovery of the same Goods, or any part thereof, for the said Reason, that one Co-Executor cannot sue another: Nevertheless, if the Testator make divers Executors, and do bequeath to the one of them the residue of his Goods, it is not only lawful for him to whom they are so bequeathed to retain the same, but also if the other Executor enter thereon, he is subject to an Action of Trespass. (l) Also if the Executor of a Co-Executor have any Goods belonging to the first Testator, the other surviving Co-Executor of the first Testator may have an Action against the Executor of that deceased Co-Executor for the same. (m) Also if there be two Administrations granted together, he that is the rightful Executor or Administrator may sue the wrongful Administrator for the Goods in his custody. (n)

(n) 36 H. 6. cap. 7. Cok. 8. 135.

6. Executors may not sue for the Goods of their Testators in the Court Ecclesiastical, but at the Common Law. (o) Yet in some Cases an Executor may sue in the Ecclesiastical Court, as touching the Testators Goods; as, when a Man bequeaths Corn growing, or Goods unto one, and a Stranger will not suffer the Executor to perform the Testament, for this Legacy he may sue the Stranger in the Ecclesiastical Court. (p) But if a Man take from an Executor Goods bequeathed, for this the Executor must sue his Action of Trespass, and not sue in the Ecclesiastical Court. (q) Also Tenants may be sued but at the Common Law by Executors or Administrators for Rents behind, and due to the Testator in his life-time, or at the time of his death, and may for the same distrain the Land charged with the Rent.

(p) T. 4 H. 3. referente Fitzh. tit. Prohibit.

(q) 32 H. 8. c. 37.

7. A Woman and another person were made Executors, the Woman

Woman took Husband, who did not alter the property of the Goods of the Testator, and then the Wife died; it was adjudged, That the other Executor might have an Action of *Detinue* against the Husband for the same Goods.

Pafeh. r Eliz. B.R.
Bend. Rep. Hugh.
Abr. tit. Exe. acc. 2.

Debt brought by an Executor as due to his Testator, and Judgment given for him, but before Execution the Plaintiff died Intestate and the Ordinary committed Administration of the Goods of the first Testator to another, who sued out a *Scire Facias* on the Judgment. All the Justices agreed, That the *Scire Facias* did not lie; for that when the Executor died Intestate, the Testator was dead Intestate also, whereby the Judgment and Recovery was void.

Anderf. Rep. par. 1.
Case 49. C.B. vid.
2 R. 3. fol. 8. 10 E. 3
fol. 26. H. 8. fol. 7.
28 H. 8. inter
Lever & Lewknor

Debt or Action was brought by an Executor, for a Debt due to his Testator, who had a Judgment, and the Executor died Intestate before Execution. The Ordinary committed the Administration of the Testators Goods to another, who brought a *Scire facias* upon the Judgment against him, against whom the Judgment was; and it was held, That it did not lie: But if the Ordinary had committed the Administration of the Intestate, and of the first Testator, to one and the same person, it had been maintainable. (1)

(1) Bendloe 2.

Whether an Executor or Administrator may have an Action against a Sheriff for not returning of a Writ, or other wrong done in the Testators life-time. (2)

(2) Vid. Croo. 3.
297. Poph. 189.

Suppose two Executors commence their Action together, whereof one is after *summoned* and *severed*: In this Case, he that is summoned may at any time before Judgment release the Duty. But if the other Executor prosecute to Judgment first, and then he that is severed acknowledge satisfaction, this shall not advantage the Defendant, nor Bar the other Executor that is Plaintiff in the Judgment. Or if three Executors, whereof two are summoned and severed, and the third recover and die: In this Case the other two Executors shall have Execution of this Judgment. (3)

(3) Brownl. 2. 58.

The Reason in Law why a *Scire facias* lies not by an Administrator against an Administrator, upon a Recovery had against an Intestate, is because it is grounded on a Record, to which the Plaintiff-Administrator is no party, claiming only by Commission. (4)

(4) Yelv. 33.

Detinue brought by an Executrix against her own Husband's Executor: The Case was this, One *Faulkner*, who was the Plaintiffs first Husband, made his Will, gave divers Legacies, and towards the end of his said Will, said, [The Residue of all my Goods I Give and Bequeath to *Frances* my Wife, whom I make my full and whole Executrix of this my Last-Will and Testament, to dispose for the wealth of my Soul, and to pay my Debts;] and died indebted

Mich. 15, 16 El.
C. B. Hunks &
Alberough's Case.
Anderf. Rep. Case
45.

indebted to divers persons, to whom the said *Frances* paid the said debts, and all the Legacies, having then Goods in her hand, for which this Action was now brought, she having after married one *John Hunk*, who made the Defendant his Executor, to whose hands the said Goods came: Whereupon the Court demurred, and Judgment was, that the Plaintiff should recover; for notwithstanding the Devise, viz. of the Residue (as aforesaid) she hath them not as a Devisee, but as Executrix, because the words of the Devise can have no other Intendment than that she should enjoy them as Executrix.

A. was indebted to *B.* who died Intestate, his Wife took Letters of Administration, and brought debt, and had Judgment, and after died intestate. And it was held, That an Administrator *de bonis non* of the first Intestate, could not sue forth Execution upon the Judgment, but is put to a new Action of debt. (5)

(5) *More, Cas. 882.* The Testator in his Will appointed *A.* and *B.* his Executors, and if they refused it, then *C.* and *D.* should be his Executors: *A.* and *B.* did refuse; whereupon the Question was, Whether *A.* and *B.* should join with *C.* and *D.* in Suits for recovery of the Testators debts? It was agreed, That where two of four Executors named do prove the Will, and two refuse, all four must join in Suit against the Testators Debtors: But in this Case it was resolved, That the Suit should be only in the name of *C.* and *D.* for that the Appointment of them Executors, if *A.* and *B.* refused, was an Implication of a Limitation of the Executorship to *C.* and *D.* only, and that conditionally upon refusal of the others; which is an evident Demonstration that the Testators intention was, That they should not all four be his Executors jointly, though each of the four was within his intention to be an Executor conditionally. (6)

Debt brought by the Executrix of *J.T.* against *W.B.* The Case was this, The said *W. B.* caused a Writing to be made and sealed, which he delivered to *V.C.* to deliver to *J.T.* as his Act and Deed: Accordingly the said *V.C.* offered the same to the said *J.T.* as the Act and Deed of the said *W. B.* but he utterly refused to receive the same as such; notwithstanding which, the said *V.C.* there left the said Writing: Which matter the Defendant pleaded, and said it was none of his Act, whereupon was a demur, and Judgment given for the Plaintiff.

Debt upon an Obligation conditioned, That if the Defendant in *Michaelmas*-Term then next ensuing, in the Prerogative Court of the Archbishop of *Canterbury* at *London*, should give to *D.* his Executors or Administrators such a Release and discharge from and against him and his Children for the receipt of One hundred Marks, as by the Judge of the Court should be thought meet,

That

Anderf. Rep. par. 1.
Case 8. inter *Taw*
& *Bury, vid. Dyer,*
1 *Eliz. & Whelp-*
dale's Case, 5 Rep.
fol. 119. E. con. H. 1.
Eliz. Rot. 442.

Trin. 41 El. Lamb
Executor of *Dra-*
bles vers. Brown-
went.

That then, &c. The Defendant pleaded, that the same Term one S. was Judge there, and that the said Judge did not devise or appoint any Release or discharge, &c. And it was thereupon demurred, and adjudged to be no Plea: For that it is not alledged that he caused a Release to be drawn and tender'd to the Judge to be allowed: For it is on his part in discharge of his Obligation, to draw such a Release as the Judge should allow: Wherefore it was adjudged for the Plaintiff, 5 *Cok. 23. b. Mich. 43, 44. C. B. Pl. 42.*

Debt as Administrator to B. upon an Obligation: The Defendant pleaded, That the Plaintiff was an *Alien*, under the Obedience of *Philip King of Spain*, Enemies to our Sovereign the Queen, and demands Judgment, whether he should be answered, and it was demurred thereupon, and adjudged that he should answer. Also an *Alien* may make, or be made an Executor, so as he be not an Alien-Enemy: For such cannot sue (as hath been held) if War be proclaimed. (1)

Pasch. 41 Eliz. Brocks vers. Phillips. Cro. rep. par. 3.

Assumpsit: By an Executor of a Promise made to his Testator: The Defendant pleads *non Assumpsit*, and found for the Plaintiff, and Judgment for him. And Error was thereof brought, and assigned, because he did not shew in Court the Testament in the Declaration mentioned: Whereunto it was said, That it was but default of Form, which is aided after Verdict; but all the Court held it to be matter of substance; for otherwise he doth not entitle himself to the Action, without shewing the Testament. For which cause it was reversed.

(1) 31 *Eliz. Pascaria de Fountain's Case.*

Mich. 38 & 39 Eliz. B. R. Edwards vers. Stapleton. Cro. Rep. par. 3. Pl. 1.

Debt upon a Special Verdict: The Case was, A Parson made a Lease for years, rendring Rent at *Michaelmas*, or within a Month next after: The Lessee enters, the Lessor dies within ten days after *Michaelmas*; Whether his Executor hath any remedy for this Rent, was the Question, and Ruled that he had not; for the Rent was not due in the Testators time, nor until the end of the month. And in such Case it hath been adjudged, that such Rent belongs to the Heir, where it is reserved by a Lay-person, and he dies after *Michaelmas*, and before the month ended. Wherefore it was adjudged accordingly, *vid. 10 Co. 129.*

Trin. 29 Eliz. C. B. Case Pilkington vers. Dalton. Cro. Rep. par. 3. Pl. 19.

Action brought by an Administrator for Rent reserved upon a Lease for years by the Intestate; and for Rent Arrear in his time the Action was brought; and he shews how Administration was committed by the Archbishop; but doth not say, *Quod profertur in curia Literas Administrationis*: The Defendant pleaded, and found for the Plaintiff. And it was moved in Arrest of Judgment, That the not shewing the Letters of Administration was matter of Substance, which made the Declaration vicious, and not aided by the Statute of 18 *Eliz.* or 32 *H. 8.* by the Verdicts;

Mich. 14 Jac. B. R. Sir John Cuts vers. Bennet. Cro. Rep. 2. par. Pl. 9. for.

for that enables the Plaintiff to his Action, and the omission thereof takes from the Defendant the advantage which he might have by demanding *Oyer* thereof; and, &c. The Court resolved, That it was a matter of Substance, which ought to be shewn by the Plaintiff to enable him to his Action: And the Defendant shall have advantage thereof at any time; wherefore it was adjudged for the Defendant. *Vid.* 28 H. 6. 31. 16 Edw. 4. 8. 21 H. 6. 23. *Plowd.* 52.

A. promised to *B.* That if *B.* would pay 50 *l.* to *C.* his Son, who was married to *D.* the Daughter of *A.* that then he would pay 100 *l.* to *D.* his Daughter at such a time. *B.* paid the 50 *l.* to *C.* *A.* failed of the payment of the 100 *l.* *B.* died Intestate, *E.* his Executor brought an Action upon the Case upon *Assumpsit*, upon the promise made to *B.* the Intestate: And it was adjudged, That the Action did well lie by the Administrator, although he should have no benefit by it, if he did recover. (7)

(7) Mich. 22 Car.
B. H. Styles 6.

Mich. 31 & 32 El.
in the Exchequer.
Ruffel & Pratt's
Case. Leon.

In *Ruffel* and *Pratt's* Case, it was held by the Justices of the Common-Pleas, and Barons of the Exchequer, That an Executor shall have an Action upon the Case, *de bonis Testatoris* casually come to the hands or possession of another, and by him converted to his own use, in the life of the Testator, and that by the Equity of the Statute of 4 Ed. 3. 7. *de bonis asportatis in vita Testatoris*.

Pasch. 10 Jac. B.R.
Browning *vers.*
Fuller. Cro. Rep.
par. 2. Pl. 1.

Error in a Judgment in *C. B.* The Error assigned; for that in *Assumpsit* brought as Executor, although he shews himself to be Executor to him to whom the promise was made, yet he saith not, *Testamentum hic in curia prolatum*. The Defendant pleaded *non Assumpsit*, and found against him, and Judgment accordingly: And this being assigned for Error, was held to be matter of Substance, and not of form only; and was therefore reversed.

Mich. 7 Jac. B.R.
Haywarch *vers.*
David. Cro. par. 2.
Pl. 6.

An Executor brings debt upon an Obligation: The Defendant pleads *non est factum*, and found for him. And now the Question was, Whether the Plaintiff should pay Costs upon the new Statute of 4 Jac. which exacts, That in every Action where the Verdict passeth for the Defendant, the Plaintiff should pay Costs: But it was resolved, That this Case is not within the intent of the Statute, he being in anothers right, and of matter which lay not in his cognizance; therefore the Law never intended to give Costs against him. And so it is upon the Statute of 8 Eliz. where Costs being given in case the Plaintiff is non-suited: As it was ruled in one *Ford's* Case, and so it was ruled here. And although *Manne* said, Costs had been allowed in the like Cases, they appointed that henceforth it should no more be so.

Pasch. 37 Eliz. int.
Harris & Vancoge.
Moo. Rep. nu. 526.

It was held, That an Administrator shall have *Trespas de bonis asportatis in vita Intestati* by the Equity of the Statute of 4 Ed. 3. and an Executors Executor by the Statute of 25 Ed. 3. And it hath

hath been held, That Letters of Administration do relate to the time of the Intestates death, and not to the time of the granting thereof: And therefore an Administrator may bring an Action of Trespafs, or a Trover and Conversion for Goods of the Testator taken away by one before the granting of the Letters of Administration; otherwise there would be no remedy of the Wrong done. (9) Per Roll. Mich. 1652 B. R. Long & Hooker. Case. Styles. 341

On a *Scire Facias* the Case was this, *Goth* was in debt to one *Couper* who died Intestate; his Wife took Administration, and brought Debt, and had Judgment to recover, and died Intestate; *Yate* the Plaintiff took Administration of the Goods of *Couper* non *Administrat.* and brought a *Scire Facias* to have Execution on the Judgment: But it was adjudged, that it doth not lie for want of Privity; but it is clear, that he may have a new Action of Debt. And by *Popham* and *Telverton*, if an Administrator recover damages on Trespafs *de bonis asportatis in vita Testatoris*, and then die Intestate, his Administrator shall have execution thereon; otherwise of a Debt recovered which was due to the Intestate. Mich. 44. & 45. Eliz. B. R. Yate. verſ. Goth. Mo. Rep. nu. 911

Tenant in Dower makes a Lease for years reserving Rent, and takes a Husband, the Rent is in arrear, the Husband dies; and it was agreed by the whole Court, That his Executors shall have the Rent. Mich. 3 E. 6. Mo. Rep. nu. 23

If *A.* make a promise to *B.* and after *B.* die Intestate, and Administration of his Goods be committed to *C.* who after dies also Intestate, and after Administration is committed to *D.* of the Goods of *C.* In this Case *D.* cannot have an Action on the promise made to *B.* as Administrator to *C.* For he is not Administrator to *B.* in that Administration was not granted to him of the Goods of *B.* unadministred by *C.* Mich. 15 Char. B. R. int. Goffyn & Osburn per Curiam. Rolls Abr. tit. Execut. lit. c

K. G. Administratrix of *J. G.* brought *Ejectione Firme* against *L. L.* and upon Not-guilty pleaded, it was found for the Plaintiff: It was moved for the Defendant in Arrest of Judgment, That the Declaration was not good, because the granting of Letters of Administration is set forth in this manner; *viz. Administratio Commissa fuit querenti per Willielmum Lewn Vicarium Generalem in Spiritualibus*, *Epi. Rot.* without averring, that at the time of the Granting of the Letters of Administration, the Bishop was in *remotis agendis*; for a Bishop present in *England*, cannot have *Vicarium*: But as to that, it was said by the whole Court, That the Vicar General in *Spiritualibus*, amounts to a Chancellor; for in truth, the Chancellor is Vicar General to the Bishop. Another Exception, because the Declaration is not *Epi. Rot. loci illius Ordinarii*, but that was not allowed, for all the presidents and course of the Court is, That by way of Declaration such Allegation needs not; but by way of Bar it is necessary. Another Exception was taken,

Y

because

Mich. 32 Eliz.
C. B. Gillam verſ.
Lovelace Leon.
Rep. Caſe 435.

because the Plaintiff hath declared of an Ejectment, and alſo *quod bona & catalla ibidem invent. cepit, &c.* And here in the Verdict, the damages, as well for the Ejectment as for the Goods and Chattels, are entirely taxed : It was adjourn'd.

C H A P. XXIII.

Of Actions maintainable againſt Executors or Adminiſtrators.

1. *Executors liable to be ſued by Creditors, though their Teſtators Goods not actually poſſeſſed by them, or imbezelled from them.*
2. *What kind of Servants wages Executors are liable to pay and diſcharge.*
3. *How Executors are liable in caſe of breach of Covenant by their Teſtator in his life-time.*
4. *In what caſe an Executor may be liable to pay his Teſtators Debt out of his, the Executors own proper money.*
5. *Several other Caſes wherein Executors are liable to be ſued.*
6. *Certain Caſes wherein Executors are not liable.*
7. *Several Law-caſes touching Actions againſt Executors and Adminiſtrators.*

(a) Offic. Exec.
cap. 10.

1. **A**lthough the Executor hath not actually and particularly laid his hands upon any of the Teſtators Goods, yet ſhall he be ſaid to be in poſſeſſion of them, ſo as to ſtand liable to the Creditors, ſo far as they extend in value, though afterwards others do purloin or imbezel them. (a)

(b) 4 H. 6. 16.

2. Executors are liable for the payment of the wages of the Teſtators Servants retain'd in Huſbandry and the like, but not for the wages of Waiters or Serving-men ; the reaſon of the difference is, becauſe of the Statute compelling the one, not the other to ſerve. (b) Yet for them alſo an Action did lie againſt the Teſtator himſelf, becauſe of his Covenant.

(c) *Noke & An-
der's Caſe.*

3. Where a breach of Covenant happens in the Teſtators life-time, the Executor ſtands chargeable ; therefore if one make a Leaſe of Land by Deed, wherein he hath nothing, and die before an Action of Covenant be brought againſt him, it will be maintainable againſt his Executor, though no expreſs Covenant. (c) Alſo if a Leſſee for years Covenants to repair the Buildings, or to pay the Quit-Rents iſſuing out of the Lands let, the Executor to whom the Term cometh muſt, as well as his Teſtator, perform that Covenant, although he did not Covenant for him and his

Exc-

Executors. (*d*) Likewise if one be Lessee for years, or for life, without any Indenture or Deed, as he may be, (*e*) and his Rent being behind dieth: In this Case his Executor shall be liable to the payment of his Rent, though without any speciality: But if the Lessee for years sell or grant away his Term or Lease and die, his Executor shall not be charged for any Rent due after the death of his Testator, though himself in his life time was still lyable for the Rent to grow due after, until the Lessor accept the Assignee for his Tenant: (*f*) So that if a Lease for years be made rendring Rent, and the Rent be behind and the Lessee die, his Executor shall be charged for this Rent; or if the Lessee for years assign over his Interest and die, his Executor shall be charged with the Arrearages before the Assignment, but not with any of the Arrearages due after the Assignment. (*g*) Also an Executor is chargeable for Tythes due from the deceased. (*b*) And if an Action be brought against an Executor or Administrator upon an Especialty for money, it is no good Plea in Bar of this Action, to plead a *Statute* or *Recognizance*, with Defeazance to perform Covenants, when there is no Covenant broken: But if the Statute or Recognizance be to pay money, it will be otherwise. (1) Nor is it a sufficient Plea in Bar of a Legacy, to plead a Bond with Condition for the performance of Covenants not yet broken, or for the doing of any other Collateral thing meerly contingent, not infringed; or to say, That the deceased was a person Outlawed. (2)

4. In an Executor sued, do plead that he never was Executor, nor Administred as Executor (for that must be added) then if Issue be taken upon this Plea, and it be found against him, the Plaintiff shall have Judgment to recover, not damages only, but the Debt it self out of the proper Goods of the Executor, if none of the Testators can be found. Likewise, as it is frequent in use for Executors to pay the Testators Debt with their own Moneys, and to make themselves satisfaction out of the Testators Goods: So it is most equal, that Executors should with their own money discharge the Arrearages of Rent of those Leases, the profits whereof themselves enjoy by virtue of the Testators Will: Therefore where an Executor is sued for Rent behind, after the Testators death, upon a Lease for years made to the Testator, and by him left to the Executor, here it shall be adjudged and levied upon the Executors own Goods; for that so much of the profits as the Rent amounted unto, shall be accounted as his own Goods, and not his Testators; otherwise a *Scire Facias* against an Executor shall not be awarded to have Execution *de Bonis propriis*, upon a Surmise, nor in any such Case, unless it be upon the Sheriffs return of a *Devastavit*. (1) Again, if Executors plead *Plene Administ.* and it be found for them, and after that certain Goods

(d) Offic. Exec.
cap. 11.
(e) 21 H. 6. 1
44 Ed. 3. 42.

(f) 44 E. 3. 5.
7 Ed. 3. 11.
14 H. 7. 4. Dyer
247.

(g) Bro. Exec.
127. & Cok. 3.
21, 22.
(h) Trin. 7. Jac.
B. R. E. N. B. 51.

(1) Bridg. Rep.
79, 80.
(2) Vid. Brownl.
142. Pl. 57. 141.
Pl. 54. 1 part. 19.
75. 50. 80. 2 par.
118, 119. 153.
Cur. Trin. 37 Eli.
& Trin. 39. Eliz.
B. R.

(1) Gro. 53. 1.
406. Wheeler vers.
Cobbler.

(i) 7 Ed. 4. 8. per
Littl.

(2) Per Cur.
31 H. 6. fol. 23.
24.

(k) Cok. lib.

Intr. 564. *Such an
Action in Yorkshire.*

(l) Brownl. Rep.

18, 19, 22, 53, 2.
part. 39 81, 139.

Coke 9. 86. &

Plow. 182. F. N.

B. 121. 3 H. 6.

35. 11 H. 4. 45.

(m) Cuius B. R.

21.

(n) 27 H. 6. 4. b.

1 H. 7. 17. 2 H. 7.

8, 9.

(o) 27 H. 6. 4.

15 E. 4. 16 Coke

lib. 9. fol. 87. b.

(p) 2 H. 4. 13.

Coke lib. 11. fol.

80. 5 H. 6. 35.

11 H. 4. 64. 91.

92. 9 H. 6. 12.

Wid. cap. 22. §. 2.

of the Testator come to their hands: In this Case, if he which brought the first Action of Debt, bring the same against them again, the Action is well maintainable, (i) or if upon pleading, *reus inter mains*, that the Executors have no Goods left in their hands to pay Debts: Yet if Goods happen after to come into their hands, the Plaintiff shall have after a *Scire Facias* out of the same Record, by surmise to have Execution of the Goods. (2) It is also to be remembred, That the value upon an Appraisment in an Inventory is not binding, nor much to be regarded at the Common Law either for or against Executors; for if it be too high, it shall not prejudice the Executor; if it be too low it shall not advantage him; but the very true value as shall be found by the Jury when it comes in question, whether the Executor hath fully Administred, or hath Assets in his hands or not, is that which is binding in the Law.

5. Executors are liable to satisfy the Obligations made by their Testators, though they be not therein bound by Name. Also an Action of the Case lieth against an Executor upon an *Assumpsit*, or the simple Contract of the Testator, especially where the ground of the *Assumpsit* is a true and real Debt. Also the *Rationabilis pars bonorum*, by Custom, in some places, is maintainable for the Widow and Children against the Executors. (k) Also a *Detinue* lieth against him for the Goods delivered to the deceased, if the Executor doth still continue the possession of them. Likewise an Action lieth against the Executor for arrearages of account found upon the deceased before Auditors. (l) Also the Executor of a man that recovereth a Debt upon a Judgment had by the deceased, shall be chargeable with restitution, if the Judgment be reversed for Error. (m) Also where a Prisoner dieth in Debt to a Goaler for his diet during the time of his Imprisonment, his Executor is liable. (n) Likewise where one hath a Tally of the Exchequer, to receive money of some Customer, Receiver or other Officer of the Kings, and delivereth it to him, he then having money of the King in his hands; if he die without paying the same, his Executor shall stand chargeable with the payment thereof. (o) Also the Executors of an Administrator are chargeable, where he did neither pay the Debts, nor leave the Goods of the Intestate to the next Administrator, but otherwise disposed of them: Yet an Executor is not chargeable in an Action of *Detinue*, nor of Account (except to the King) for the Testators detaining, and not paying, or answering things received, or under his charge. (p)

6. But an Executor, as hath been formerly implied, is not chargeable for any personal wrong done by the deceased, for it dies with his person; neither will an Action of Debt lie against him upon the simple Contract of the deceased, but an Action of the

Case

Cafe only. Neither will an Action lie against an Executor upon an Arbitrement made in the life-time of the Deceased, albeit it be made in writing: Neither will an Action lie against an Executor for Coſts given in *Chancery* against the deceased in a Suit there; for it is lost when the party dies. And where there be many Executors, and all have accepted, they must all be joined in the Suit; but if some of them have refused, possibly the Suit may be good enough against the rest. (q) Otherwise, one Executor cannot be charged without his Co-Executors, except it bein the Cafe of Severance, and in some special Cafe where one alone doth the wrong; as where one Executor doth detain the Deeds from the Heir. (r)

(q) *Adjudged*, Hill. 40 Eliz. B. R. *Bowyers Cafe*, Hill. 7 Jac. B. R. per 3 *Justices*. Coke 9. 39, 40. Bro. tit. Execut. 70. 136. Fitzh. Brief. 341. (r) Brownl. 1 part. 18, 19. 22. 53. 2. part. 39. 81. 139.

7. Debt brought against the Executor of *H. W.* The Defendant pleaded, That he never was Executor, nor Administred as Executor. The Jury found, That the said *H. W.* died possessed of divers Goods, and that one *W. A.* was indebted Seven pound to him, which the Defendant had received, and for which he had given his Acquittance, and that immediately after the death of the said *H. W.* the Defendant took into his possession all his Goods, converted them to his own use, enjoy'd them, and disposed of them to his own profit at his own will and pleasure. And whether upon this matter of Fact, the Defendant were Executor or not, was submitted to the Court; who were of Opinion, That this matter of Fact was the Administration as of an Executor, and that the Defendant should be charged accordingly.

Mich. 5, 6. P.M. C. B. *Stokes* vers. *Porter* Andersf. Rep. par. 1. Cas. 23.

Scire Facias upon a Judgment against a Testator in Debt brought against his Executors, who pleaded, That before they had knowledge of this Judgment, they had fully Administred all the Testators Goods in payment of Debts upon Obligations. It was adjudged no Plea, for at their Peril they ought to take knowledge of Debts upon Record, and ought first of all (unless Debts due to the Queen) to have satisfied them. It was adjudged accordingly.

Mich. 43 Eliz. C. B. *Littleton & Hibbin's Cafe*. Cro. 3. par. 793.

Although an Executor plead, That he did never Administer as Executor, yet he may afterwards Administer as Executor, if he please. (1) And where there are three Executors, whereof two prove the Will, and the third refuse the Executorship; yet this third refusing Executor alone may release any Debt due to the Testator.

(1) Goldsb. 31. Plow. 2.

If a Sheriff levy money upon a *Fieri Facias*, Action of Debt will lie against his Executors for it. (2)

An Action once attachable against an Executor, is not taken away by a subsequent Administration. (3)

(2) Co. 9. 94. March. 13. (3) Hob. 49.

Action of Debt will lie for the Creditors against Executors *quoad usq;* *A. B.* comes of the age of 21 years, if such Executors waste or sell the Goods. (4)

(4) Hob. 265.

(5) 34 H. 6. 45. A *Capias ad satisfaciendum* will not lie against Executors, upon Hugh. Abr. Cal. 4. a *Plene Administravit* pleaded by them. (5)

If a man hath a flock of Cattel, or personal Goods only for a time, and the Lessee Covenant for him and his Assigns, to deliver it at the end of the Term, or pay so much Money, and after assign it over to another; the Assignee shall not be charged with this Covenant, but the Executors or Administrators shall be bound by it. (6)

(6) Co. 5. 17.

The Executor of him who dies in *Execution*, is no further chargeable. (7)

(7) Hob. 52. 56.

If a Bishop grant an Annuity out of his Lands to *A. B.* for life, and die: In this Case, it seems, the Bishops Executor or Administrator shall be charged with the arrearages due in the Bishops time. (8)

(8) Dyer 370.

Lessee for years devised his Term, made his Executors, and died; the Executors commit *Waste* on the Lease-Lands devised: Afterwards they assent to the Devise; in this Case it is held, That the Action of *Waste* shall lie against the Executors. (9)

(9) Co. 4. 12.

If an Executor assume or undertake to pay a Debt of the Testators, this will bind or oblige him, and he may be sued upon it, whether he have *Assets* or not. (10)

(10) Clayt. Rep. Case 141.

A Lease is made for years by Indenture, rendring Rent, *Debt* will lie against the Lessee's Executor, though his Testator the Lessee never entred upon the Land. (11)

(11) Yelvert 103.

An Action of Debt was brought upon a Bond of 400 *l.* against an Executor, dated 35 years before, and no suit upon it, nor interest paid for it in all that time. And it was held to be paid, and said to be the usage in such Cases. And so by direction of the Judges, the Jury found, That it was paid. (12)

(12) Clayt. Rep. 170.

Although the Executor or Administrator of a Lessee stands charg'd with the arrearages of the Rent behind at the Lessee's death, yet with such arrearages thereof as grew due after the Lessee's Assignment of his interest to another, he shall not be charg'd. (13)

(13) Bro. Exec. 127. Cok. 3. 22. 24.

An Administrator is still suable, though the Administration be granted to another. (14) And the Executor or Administrator of a man that recovereth a Debt on a Judgment had by the deceased, shall be chargeable with Restitution, if the Judgment be after reversed by Error. (15)

(14) Hob. 49.

(15) Cur. 21. Jac. B. R.

Debt was brought by *S. B.* against *D. B.* and others, Defendants Executors, &c. The Defendants pleaded Recovery against them by another in an Action of Debt, and shewed the Contents of the Record: To which it was replied, That the Recovery was by Covin, to defraud the Plaintiff of his Debt, and hereupon Issue was joyned: It was found by Verdict for the Plaintiff, and agreed by

Hill. 29 Eliz. C. B. *Brasbridge* vers. *Baskeville*, Anderf. Rep. Cal. 197.

by all the Justices, That the Judgment should be against the Executor, as against the Testators Goods, and not as against his own proper Goods, being hereunto, upon good advice, inclined for several Reasons: 1. For that the Plea was a void Plea; for the Record which the Defendant pleaded, was such as the Plaintiff doth confess and avoid, and not like that which is every way false; as when one pleads, that he never was Executor, nor Administred as Executor, &c. which Plea being every way false, and so within his own knowledge also, doth for that reason cause, that Judgment in that Case shall be of his own proper Goods. 2. Another reason is, That because such Judgment is most agreeable to Reason; *viz.* To give the Plaintiff Recovery of his Debt out of the Testators, and not the Executors Goods, which is conceived a more reasonable way than to charge the Executors; for that they bear the burthen of the Administration of the deceased's Will, they deserve to have as much favour as Reason will admit, and not be charged of their own proper Goods. It was further said, That if an Executor should be liable to such Judgment of his own Goods, it would be a cause of often refusing the Administration of Testaments, for it is a thing of ill consequence to bind Executors in their own proper Goods in any other Cases than have been in fore-time adjudged: Which Cases were cited out of divers Books, but here omitted for Brevities sake; none of which Cases have any resemblance with this in Question.

Debt was brought against an Executor: The Plaintiff declared upon a simple Contract; to which the Defendant pleaded, *Fully Administred*: It was found against him, and moved in Arrest of Judgment; for that the Action was against an Executor who is not chargeable in that manner: And it was said, That when it doth appear to the Court, that the Executor is not chargeable, the Court ought not then to judge for the Plaintiff; and to this purpose some Books were cited, and it was said, That the reason why an Executor shall not be charged upon a simple Contract, is, for that he is a stranger, and cannot have notice of the Contract, and therefore the Law will not have him to be charged for that alone, without somewhat else: But in this case it appears that he had notice of the Contract, inasmuch as thereupon he pleaded, *Fully Administred*, and that Plea being admitted, it implies as if he had known of the Contract; and therefore when he pleaded, that he had fully Administred, which was found against him, Judgment ought to have been given for the Plaintiff; for Proof whereof a Judgment was cited, which appears to have been given, *An. 10 H. 6. fol. 15.* and *13 H. 6.* as the Book says in the like Case against an Executor upon a simple Contract. All which notwithstanding, it was resolved by the Court, That the Plaintiff should take nothing.

*Mich. 30, 31 Eliz.
C. B. Anderf.
Rep. Cal. 218.*

nothing by his Writ, giving their Reasons for such their Judgments; which for brevities sake are also here omitted.

Debt against an Administrator upon an Arbitrement made betwixt the Plaintiff and the Intestate in Writing; and the Defendant demurr'd thereupon: And without argument it was adjudged for the Defendant, because the Intestate might have waged his Law. But otherwise it were, if it had been in Debt upon arrears of Accounts before Auditors.

Assumpsit against an Executor upon the promise of the Testator, and in the Declaration it was not averred, That he had Assets to pay Debts, &c. But *Mich. 29. & 30 Eliz.* it was adjudged, that the Declaration was good; and the Plaintiff recovered.

Debt against an Executor upon an Obligation made by his Testator; The Plaintiff was Non-suited, the Defendant had Costs by order of the Court. Otherwise it is where an Executor is Plaintiff, and is Non-suited. For it cannot be intended, that it was conceived upon malice by him. *Vid. Stat. 23 H. 8. cap. 15.*

Debt against an Executor upon an Arbitrement, made in the time of the Testator. It was demurred in Law, Whether it lay or not? Because the Testator might have waged his Law. And adjudged, without argument, that it lay not.

Debt against P. as Executor. The Plaintiff had Judgment to recover *de Bonis Testatoris*. And thereupon a *Scire Facias* was awarded, and the Sheriff returned, *Quod nulla habuit bona Testatoris*. And the Plaintiff surmisseth, that he had wasted the Testators Goods; whereupon he prayeth a *Scire Facias*, why he should not have Execution *de Bonis Propriis*? and ruled by the Court, That this Writ shall not be awarded, upon the surmise of the party, upon a Devastation; nor in any Case where the Judgment is *de Bonis Propriis*, unless it be upon return of the Sheriff, where he returns a *Devastavit*. *Vid. 9 H. 6. 9. & 57. Fitzb. Execut. 9.*

Debt against an Administrator: The Case was, The Intestate granted to the Plaintiff by Deed, all his Goods mentioned in the Schedule, for 20 *l.* and died: For which Goods the Plaintiff sued his Administrator, shewing what the Goods were in *Specie*: To which the Administrator-Defendant pleaded, the Statute of 13 *Elizabeth*. against *Fraudulent Deeds*, and that the Intestate was the 2 *Fac.* indebted to divers persons in several sums, shewing to whom and what; and then made this Gift in *Fraud*, &c. and occupied the Goods during his life. The Plaintiff that replied the Defendant had *Assets* in his hands, and that the Gift was upon good Consideration; upon which it was demurred. And the Demurrer held good; 1. For that the Defendant in his Bar, had not averred, That the Debts due to the Creditors were unpaid, nor that they were Debts due by Specialty. 2. For that the Defendant supposed

Mich. 39, 40 Eliz.
B. R. Bowyer
vers. Garland.
Cro. Rep. par. 3.

Pasch. 29, 30 El.
B. R. Cottington
vers. Hulet. Cro.
Rep. par. 3.

Trin. 38 Eliz.
Fetherstone vers.
Allybon. Cro.
Rep. par. 3.

Pasch. 39 Eliz.
Hampton vers.
Boyer. Cro. Rep.
par. 3.

Pasch. 38 Eliz.
Adworth vers.
Peel. Cro. par. 3.

posed it would be a *Devastavit* in him, which was not so; for that the Goods in the Plaintiffs hands were not liable to the Creditors. 3. For that the Defendant was not such a Person as is enabled to plead that Plea: For the Statute which makes such Deeds void, makes them void as against the Creditors, not against the party himself, his Executors or Administrators. (16)

An Executor or Administrator for Tythes due from the deceased, is to be charg'd only in the *Spiritual* Court, and not in any Temporal Court on this Account. (17)

Where there is an Administrator *durante Minori etate* of an Executor, the *Minor* when he comes of age, may not have an *Account* against such Administrator for Goods, but he must have a *Definue* for them, or sue the Administrator in the *Spiritual* Court. (18)

If a *Scire Facias* be brought against an Executor, to shew cause why he should not pay a Debt to the Plaintiff recovered against the Testator, the Executor may not plead *plene Administravit*; but he must plead, That no Goods of the Testator's are come into his hands, whereby he might discharge the Debt: For he may have fully Administrated, and yet be liable to this Debt. (19)

If an Executor in Bar to any Action brought against him, plead (as he may) a Debt due by his Testator to the King, (20) he must then withal say in his pleading, The Debt is a just and true Debt, and not paid or satisfied. (21) Or if he pay a Debt upon an Obligation before a Statute be broken, such payment will be a good Plea in Bar against the Statute. (22)

In Debt against an Administrator, and a *plene Administravit* pleaded, the Judge did allow him to give in Evidence, Judgments precedent without pleading of them; and it was held, That an Acquittance shewed in Evidence for 100 *l.* paid to a Creditor, is good in discharge of an Inventory for so much; and if the Debt were compounded for less than the Acquittance mentions, the other party must shew and prove it, especially if it be an Acquittance of the King's Officer, for the King's Debt. (23)

Scire Facias against an Administratrix to have Execution of a Judgment against the Intestate: The Defendant pleaded, *Quod nulla habet bona, quæ fuerunt Intestati, tempore mortis suæ, in manibus suis Administranda, nec habuit die impetrationis brevis, nec unquam postea.* And it was thereupon demurred, and held by all the Court, that it was not any Plea; for a Judgment cannot be answered without another Judgment; and it may be, she had Administrated all the Goods in paying Debts upon Specialties, which is not any Administration to Bar the Plaintiff. Or (as some said) it may be she had paid Debts upon a Statute or Recognizance, which is not allowable against a Judgment. But *Anderfen* denied

(16) Cro. 2. 270.
Hands ver. 4.
Leader.

(17) Trin. 7 Jac.
B. R. F. N. B. 52.

(18) Benlo. 25

(19) Styles Re-
gift. 120.

(20) Cro. 2. 182.

(21) Ibid. Woodell
ver. Hungate

(22) Cro. 2. 8, 9.
Phillips ver.
Eckard.

(23) Clayt. Rep.
Case 112.

Pasch. 39 Eliz. C.
B. Ordwey ver.
Godfrey, Cro.
Rep. par. 3. Pl. 20

it; for there is not any priority of Debts upon Record, unless in Case of the Queens Debt, which is first to be paid. And here the Defendant ought to have pleaded specially, how she had Administred. Wherefore it was adjudged for the Plaintiff.

Tin. 39 Eliz. C. B. inter Wolley & Bradwel, and his Wife Executrix of Sir Thomas Mannors. Cro. Rep. par. 3. Pl. 21.

The Defendant pleaded Out-lawry in the Testator, 29 *Eliz.* not reversed, and it was thereupon demurred. *Herne* for the Plaintiff moved, That it was not any Plea, because (admitting it to be a Plea) it should be, in regard of the Testators being Out-lawed, he should not have any Goods but what appertained to the Queen, and then the Executors might not have any Goods to satisfy: But that is not so; for the Testator might have a Debt due to him upon a Contract, which is not forfeited; or, it might be, the Testator devised Lands to be sold, and which are sold, the money is Assets in their hands; and in 3 *H. 6. 17.* and 32. it was holden to be no Plea. And of that opinion were *Walmesley* and *Owen*. For a person Out-lawed may well make a Will, and have Executors, over and besides the Goods forfeited to the Queen, as in the Cases before put, and others of the same nature: But *Reamond e contra*, for the Bar is good to a common intent; and these kind of Assets shall not be intended, unless they be shewn, Wherefore *Prima Facie* the Plea is good. *Anderson absente Adjournatur*. Afterwards for defect of pleading, without regard to the matter in Law, it was adjudged for the Plaintiff, 8 *Ed. 4. 6. 21 Ed. 4. 5. 39 H. 6. 27.*

41 Eliz. C. B. *Anonymus*. Cro. Rep. par. 3. Pl. 10.

Error of a Judgment in C. B. against three Executors: The Error assigned was, That one of them died pending the Writ before Judgment. And *Warberton* moved, that this was Error: But when one of the Executors Plaintiffs die, this is no Error, for they might be severed: But the Court held it no Error. 3 *H. 7. 1, 3. 8. Ed. 3. 11.*

Mich. 42, & 43 Eliz. C. B. *Littleton* vers. *Hibbins*. Cro. Rep. par. 3. Pl. 37.

Scire Facias against Executors, upon a Judgment against their Testator in Debt: They pleaded, that before they had any knowledge of this Judgment, they had fully Administred all the Testators Goods in paying of Debts upon Obligations; and it was thereupon demurred, and after argument at the Bar, adjudged for the Plaintiff, that it was not any Plea. For they at their peril ought to take Cognizance of Debts upon Record, and ought first of all (unless for Debts due to the Queen, wherein she hath a Prerogative) to satisfy them; and although the Recovery was in another Country than where the Testator and Executor inhabited, it is not material: But if an Action be brought against them in another County than where they inhabit, and before their knowing thereof they pay Debts upon Specialties, that is allowable, wherefore it was adjudged accordingly. *Vid. 4 H. 6. 8. 21 Ed. 4. 21.*

Debt against an Executor, who pleaded he had *rienes in ses mains*, but certain Goods distrained and impownded, it was adjudged to be no Assets to charge him.

The Case was, *A.* covenanteth with *B.* to put his Son an Apprentice to *C.* or otherwise that his Executors shall pay *B.* Twenty pound. *A.* doth not put his Son an Apprentice to *C.* and dieth; *B.* brings Debt against the Executors of *A.* and it was resolved by the Court, That it lyeth not for two Reasons: 1. It cannot be a Debt in the Executor where it was no Debt in the Testator: And if one covenants to pay Ten pound, Debt lieth against him or his Executors, as 40 *Ed.* 3. & 28 *H.* 8. *Dyer* are; but if he doth covenant, that his Executors shall pay Ten pound, an Action lieth not against them. 2. The first part of the Deed sounds in Covenant, and the second part shall be of the same nature and condition. *Q.* of this Reason.

Note, *Assumpsit* by the Testator lies against his Executor, in Case the Debt riseth upon a Loan and Promise of the Testator to pay, and the Promise be for the payment of a meer Debt, and not to do any collateral Act, and where the Testator himself, by reason of such Promise, could not have waged his Law; in such Case his Executor is chargeable; but upon a meer collateral Promise of the Testator, an *Assumpsit* lies not against his Executor. Such was the Opinion in *Q. Eliz.* time: But now in *Reg. Jac.* the Opinion of both Courts was, and resolved, That the Action against the Executor lies as well in the one Case as in the other.

In an Obligation two were bound to a third jointly and severally: The Obligee made the Wife of one of the Obligors his Executrix, and died; the said Wife Administred: Then the Husband of the Obligor made her also his Executrix, and died, leaving Assets to pay the Debt; Then she died, and the Plaintiff took Administration of the Goods and Chattels of the Obligee unadministred, and brought his Action against the Defendant, being the surviving Obligor: In this Case it was held, That the Action would not lie, for that it was suspended and gone. (24.)

One as Administrator, commenced his Actions for Goods belonging to his Intestate: To which was pleaded, *Non Detinet* by the Defendant, who produced in Evidence *Letters Testamentary* of the same person, who was supposed to have died Intestate; and it was admitted for a good Evidence. (25.)

In Debt on a Bond against an Executor, who pleaded *Plene Administravit*, giving in evidence Bonds cancelled or taken in, or Acquittances for money paid: It was held not good, without proof of real payment made, or new security given for payment. (26.)

Mich. 26. *Eliz.* C. B. *Anonymus.* C. 6. Rep. par. 3. Pl. 8. Patch. 33 *Eliz.* G. B. Ferrer verfi. *Austin.* C. 6. Rep. par. 3. Pl. 2.

Vid. Cas. *Legate* verfi. *Pincheon* *Mich.* 9 *Jac.* B. R. & Cas. *Clark* verfi. *Thompson.* Hill. 17 *Jac.* B. R. & Cas. *Fawcett* verfi. *Charter.* Hill. 20. *Jac.* B. R. *Qui omnes Casus in* C. 6. Rep. par. 3.

(25)
115.

(26) *Ibid* Cas. 192

Hill. 11 Jac. C. B.
Harecourt vers.
Wrenham Mo.
Rep. nu. 1178.

Scire Facias sued by *H.* against *W.* Executor to his Father for Execution of a Judgment obtained against the Testator. The Defendant pleaded *Plene Administravit* at the time of bringing the Action; and thereupon they were at Issue, and the Jury found, That the Testator conveyed a Lease in trust to one *Fisher*, against whom the Executor had recovered One Thousand pound in Chancery, which was come to the Executors hands, *Et si super tota materia, &c.* Two points in this Case were argued at the Bar and Bench: 1. Whether the Plea of *Plene Administravit* at the time of bringing the Writ were good, in that Judgment was given against the Testator in his life-time; and it was ruled, that it was not good, but that in such Case the Executor should have pleaded, There was nothing in his hands at the time of the Testators death, because the Judgment bound him to satisfy that Debt before others: But by the joyning of Issue, the advantage of that Exception to the Plea was waved. 2. Whether the sum decreed in Equity in the Chancery shall be Assets; and they all agreed it should be Assets, because the Jury found, that by virtue of the Executorship it was come to the Executors hands. 9 Eliz. Dyer 264. And money arising of the sale of Lands by Executors, shall be accounted Assets. *Chapman and Dalton's Case.* *Plowd.* Also damages recovered by Executors *pro bonis asportatis in vita Testatoris* shall be Assets. *Vid. Pasch. 39 Ed. 3. and C. B. Ordinary and Godfrey's Case. Nota per Coke, Cro. & Dod.* That if an Executor receive any thing as an Executor, by Equity in Chancery, that thing so recovered shall be Assets. And *per Cur.* If I devise that my Executors shall sell my Land; if they sell, though the moneys proceed of such Land sold, was never in the Testator, yet forasmuch as they came to them as Executors, they shall be Assets. And it was adjudged *per Cur. in Banco*, That moneys recovered in Equity by Executors, shall be Assets, for which *Dod.* also cited in the Case between *Harwood and Wrayman.* *VV.* as Executor to *P. S.* sued *F.* in Chancery, supposing that he had a Lease of the Testators in Truth: And for that *F.* had disbursed divers sums of money for the Testator, it was decreed, That he should retain the Lease, and pay a considerable sum of money to the Executor for the Overplus of the value of the Lease. The Question was, Whether those moneys so recovered in Chancery should be Assets? It was adjudged *per totam Curiam*, That they were Assets. (27)

(29) Trin. 12 Jac.
B. R. Roll. Rep.

If it be found by a Jury, That an Executor hath Assets, but not to what value: For that reason it is not good, *quod fuit concessum per Curiam*: For the Plaintiff ought to recover only according to Assets found; and a Reversion upon an Estate-tail is not Assets. (28)

(28) Mic. 33 Jac.
B. R. Ever. vers.
Sutcliffe. Roll.
Rep.

VV. and others brought Debt against the Defendant as Executor, he pleaded *Plene Administravit*: And it was found by Verdict, That the Defendants Wife was made Executrix, who to defraud the Creditors, had made a Deed of Gift of the Goods before her marriage with the Defendant, and yet retain'd them in her possession, and took the Defendant to Husband, and died; and the Defendant had now as much Goods in his hands as would suffice to pay the Creditors their Debts. And the Court adjudged for the Plaintiff, for that the Defendant confess'd himself Executor by pleading, *Fully Administrated*, and therefore is chargeable, because the property of the Goods pass'd not out of the Wife by that Grant, being fraudulently made as aforesaid, by the Stat. 13 *Regin.*

Hill. 37 Eliz.
Watson's Case.
 Mo. Rep. nu.
 518. 495.

One sued an Executor in the Ecclesiastical Court for a Legacy, who pleaded Recovery in Debt against him at Common Law, and beyond that he had not Assets wherewith to satisfy. To which the Plaintiff in the Ecclesiastical Court replied, That the Recovery was by Covin, and that the Plaintiff in the Recovery offered to discharge the Judgment, and the Defendant would not. And hereupon the Question was, Whether a Prohibition should be awarded, or not. And it was resolved, That it should not be awarded, for that the Covin or Fraud is properly examinable in the Ecclesiastical Court, because the Legatee cannot sue for his Legacy at the Common Law. But if Suit be in the Spiritual Court on a Legacy for a Lease, then a *Prohibition* shall be granted, *quod fuit concessum per Coke*; who also said, That if the *Spiritual* Court give Judgment on an Acquittance, or an Arbitrament, or Award, otherwise than it ought to be by the Common Law, then also a *prohibition* shall be granted, *quod fuit concessum per Dod.* And *Coke*, by the *Spiritual* Law, a Gift of Goods is not good without delivery: But if they judge therein according to that Law, a Prohibition shall be granted. But in a Suit in the *Spiritual* Court for a Legacy, a *Prohibition* shall not be granted upon the pleading of payment thereof: So if an Acquittance be there pleaded, no *Prohibition* will lie, 1 R. 3. The reason hereof is, because where the *Spiritual* Court hath cognizance of the *original and principal matter*, there a matter subsequent and depending thereon, triable at the Common Law, shall not deprive or out the *Spiritual* Court of its Jurisdiction therein. (29)

Pasch. 14 Jac.
Lloyd vers. Maddox.
 Mo. Rep. nu.
 1307.

(29) Pasch.
 12 Jac. B. R.
 Rol. Rep. Case
 14.

Action upon the Case of Trover of Goods: The Case was this, a Recovery in the Exchequer was had against the Executor of P. of Debt and Damages, and *Fieri Facias* issued *de bonis Testatoris si &c.* And if none, then *Damna de propriis*: The Executor dies, the Sheriff levies Execution of the Testator's Goods before the return of the Writ, and adjudged good notwithstanding his death after the Test of the Writ.

Cafe *Boddy* verſ.
Hargrave Mo.
Rep. nu. 771.

B. brings Debt againſt *H.* on a Demife for years to one unto whom *H.* was Adminiſtrator: And the Writ was in the *Debet* and *Detinet*. Whereupon in Arreſt of Judgment it was ſhew'd in *B. R.* That it ought to have been in the *Detinet* only, becauſe againſt an Adminiſtrator: But it was adjudged, That it was good in the *Debet* and *Detinet*, becauſe the Rent due incurr'd in the Adminiſtrators time, and the Land is not Affets, but only ſo much of the profits as the Land is worth above the Rents; and the Adminiſtrators ſhall not answer for more than the Land is worth, deducting the Rent: But in all Caſes where an Executor or Adminiſtrator brings an Action for a Duty teſtamentary, there it ought to be in the *Detinet* only, becauſe the Duty being demanded, ought to be Affets.

10 *H. 6.* 25. Co.
9 *Pinchon* 88.
Roll. Abridg.
Adjudged inter
Germaine and
Rowles.
Hill. 39 *Eliz.* B.
R. Dodington's
Cafe. Cro. Rep.
par. 3.

An Executor is not chargeable for a Debt due by the Teſtator upon a ſimple Contract. Regularly an Executor ſhall not be charged without Specialty in any Action wherein the Teſtator might wage his Law, for that an Executor cannot wage his Law of other mens Contracts, 46 *Ed.* 3. 10. *b.* 11 *H. 6.* *b.*

Information in the Exchequer in nature of an Account was brought againſt *D.* Executor of *W. M.* ſuppoſing that *W. M.* had received money of the Queens amounting to One thouſand five hundred pound, upon a ſpecial Verdict: The caſe was, That *W. M.* had received annually out of the Exchequer Fifty pound as a Fee for his Diet for thirty years together, which was paid him by the command of the Lord Treafurer; who had Authority by Privy Seal to make allowance and payment of all Fees due, but in truth, theſe were not any due Fees: And whether his Executor ſhall be charged with theſe ſums ſo received, was the Queſtion. And after Argument it was adjudged, that he ſhould be charged; for it was held, That this payment of the money by the appointment of the Lord Treafurer, was not allowable; for the Privy Seal is not ſufficient authority to diſpoſe of the Queens Treafure, unleſs where it is due; and he diſpoſing of it otherwiſe, it is out of his authority. 2. It was held, That this money delivered by authority of the Lord Treafurer, who is *quafi* a Judicial Officer, and it was *quafi* a judicial Act by him; yet it ſhall not bind the Queen: for it was without his Authority, without warrant, to make allowance thereof, not being due; and it is at his peril who receives it, or demands allowance thereof. For theſe and other Reaſons (*mentioned in the Report*) it was adjudged for the Queen againſt the Defendant; and although he were Executor, he ſhould answer for it as a Debt from the Teſtator, 11 *Co.* 90 *b.*

Mich. 37, & 38
Eliz. in Cam.
Scac. *Stubbin's*
verſ. *Rotheram*.
Cro. Rep. par. 3.

Errorr upon a Judgment given in an *Aſſumpſit* againſt an Executor upon a promiſe of the Teſtators, where the Plaintiff declared, That the Teſtator in conſideration of Marriage promiſed to

pay the Plaintiff One hundred pound, and for non-performance of this promise brought the Action, and Judgment there given for the Plaintiff: And this matter was assigned for Errour, that the Action lay not against an Executor; and all the Justices and Barons (besides *Clark* Baron) held it to be Erroneous for this cause: For *Anderson* said, The reason why Debt lies not against an Executor upon a Contract of the Testators, is, because the Law doth not intend that he is privy thereto, or can have notice thereof, and he cannot gage his Law for such a Debt as the Testator might; and when Debt will not lie, it is not fit that this Action upon a bare promise should bind him; for it stands upon one Reason: And if these Actions should be allowable, it would be very mischievous, wherefore the Judgment was reversed. Q. Whether a Recovery in this Action against an Executor, is allowable against a Debt upon an Obligation, if it should be an Administration; for then it would be mischievous to Creditors: And if it should not be an Administration, it would then be mischievous to Executors, that they should be charged therein, and not have allowance thereof against other Creditors; for it may be, that at the time of the Recovery they did not know of other Debrs. Note, that this Term was given the like Judgment betwixt *Griggs* and *Helbouse* in an Action brought against an Administrator upon a promise of the Intestates to pay money, &c.

Action of Debt was brought against Executors, who pleaded three Judgments for 100 *l.* apiece, and that they had not 20 *l.* more of the Testators: The Plaintiff replied, That they were, satisfied, and kept by fraud; and it was held, That if the Defendant fail'd in proof of the full satisfaction of any one of the said three Judgments, that the Issue should be against him, though the rest were satisfied. (30)

(30) Cl.
Case 220.

An Action of Debt was likewise brought against two persons as Executors of the Last-Will and Testament of *A.* One of them pleaded, *Plene Adminstravit*, and exhibited an *Inventory*: It was held, That the other should not be obliged by it, but that the Plaintiff must prove that he had actually Administred, and that Goods of the Testators came to his Hands, and so give him a charge; and because the Plaintiff could not prove this, he was Nonsuit. (31)

(31) Idem. Case.

Lessee for years died Intestate, *A. B.* took Administration of his Goods, and for Rent-arrear in the time of the Administrator, after the death of the Intestate, Action of Debt was brought against the Administrator in the *Debet & Detinet*; and it was adjudged, That the Action was maintainable. It was *Hargrave's Case*. (32) (32) Co. 5. par. 31. Sed Q. For there is a report, (33) That *Hargrave's Case* was reversed in the Exchequer Chamber, and then adjudged, That the Action

171.

(32) Co. 5. par. 31.

Hargrave's Case.

(33) Hill. 43 Eliz.

Action

(34) Pasch. 7 Jac.
B. R. Lord Rich
& Frank's Case,
& 43 Eliz. B. R.
Spark's Case.
Mich. 30, & 31
Eliz. B. R. Mar-
tyn vers. Alice
Whipper. Cro.
Rep. par. 3.

Action ought to have been brought in the *Detinet* only: But in all Cases and Actions brought by Executors, as Executors, the Writ shall be in the *Detinet tantum*, although the Duty doth accrue in their own time, because the thing recovered shall be *Assets*; and so it was adjudged in the Case of the Lord Rich, as also in *Spark's Case*. (34)

Debt against the Defendant as Administratrix of *J.* Upon *plene Administravit* pleaded, it was found by Verdict, That the Testator at the time of his Death had Goods to the value of One hundred pound, and was bound to another by Obligation in One hundred pound, and that the Defendant had taken in this Obligation, and made another in her own name with Sureties to the Obligor. And upon the motion of *Heale*, the Court held, That this was an Administration, and it is in the nature of a payment, and so much of the Testator's Debt is thereby discharged; and so it was said to be adjudged in *VWood's Case*. *Nota fuit* ruled accordingly, *Pasch.* 30 in C. B. which was entered, *Mich.* 28, 29 *Eliz.* inter *Stamp & Hutchins*. In like manner, if Executors plead, *Plene Administr.* and the Plaintiff give in evidence, *Assets in mains*; and the Executors plead, That the Goods of the Testator now in their hands, were pledged by the Testator; which Goods they have redeemed with their own proper Money to the full value; and the residue of the Goods they have paid for the Debts of the Testator as far as they were worth: Upon a Demurrer in Law, this evidence was adjudged good; for a man shall be recompenced for that which he hath lawfully paid; and it is not like where a man deviseth, That his Executors shall sell the Land, for there they cannot retain, because the Will is, That they shall sell. (35)

(35) Mich. 6 H.
6.
Mich. 44, 45 El.
B. R. Slade &
Norley's Case
Yelv. Rep.

Action upon the Case on *Indebitatus Assumpsit* doth well lie, for every debt implies a promise; and it is one good consideration in *Facto* whereon to found an Action: But for a Debt by simple Contract due by the Testator no *Assumpsit* lies against Executors, and it was openly deliver'd by *Popham* Chief Justice, *No.* 44 *Eliz.* to be the Resolution of all the Judges, and to be a president in all Cases that might after happen.

Mich. 5 Jac. B.
R. Howse &
Webster's Case.
Yelv. Rep.

It was agreed by *Telverton*, *VWilliams* and *Crook*, Justices, That if a man by Indenture lease Land to *J. D.* for years, rendring Rent, and *J. D.* dye making *A.* his Executor, the Lessor may have Action of Debt against the Executor for the Rent reserved, and the arrears thereof after the death of the Lessee, albeit the Executor never enter nor agree to the Lease; for the Executor represents the Testator's Person, and the Testator by the Indenture was stopp'd, and concluded to pay the Rent during the Term upon his own Contract; and albeit the Rent exceeded the value of the profit of the Land, yet the Executor cannot wave the Land, but

but notwithstanding that shall be charg'd with the Rent. *Vid. Opin. Aſcue*, 21 H. 6. 24. & 11 H. 4. *Contr.*

Action *ſur Trover* and *Conversion* of Goods, upon Demurrer the Caſe was: The Ordinary committed Adminiſtration of the Goods of an Inteflate to the Defendant; afterwards the next of Kin ſues out a Citation in the Eccleſiaſtical Court againſt the Defendant, to repeal the Adminiſtration, and he (*pendente Lite*) ſells thoſe Goods, and afterwards his Adminiſtration is repealed, and Adminiſtration committed to the Plaintiff, who for this *Conversion (pendente Lite)* brings this Action; and it was moved for the Defendant, that this Action lies not, for the Adminiſtration at the Common Law is well committed, and the Statute doth not alter the Law in this point, but gives a Penalty againſt the Ordinary, if he commits them not to the next of Kin, and the Adminiſtrator, till Adminiſtration repealed, hath an abſolute Authority to diſpoſe of the Goods as he pleaſeth. *Tanfield e contra*, The *Conversion pendente Lite* in the Eccleſiaſtical Court is not lawful, but is a Tort to the Plaintiff, and that the Sentence there proves, which is, that all things attempted or done *pendente Lite* ſhall be void, and the Juſtices ought to have regard to the Civil Law in this point, as in 27 H. 6. *Guard* 118. 2 R. 2. *Quare Impedit* 143. and 4 H. 7. 13. And by the Sentence it appears, that the Adminiſtration is revoked, as if it never had been; and upon this reaſon it is in *Dyer* 339. where an Adminiſtrator recovered a debt, and afterwards another procured himſelf to be joined in the Adminiſtration, and releaſed the debt; and afterwards it being revoked, this Releaſe was not any Bar to the Execution. And *Mich.* 25, 26 *Eliz.* in the Common Bench between *White* and *Cary*, this very point was in queſtion, and adjudged that the Action lay. *Gawdy*, The Action well lies, for the Sentence doth not repeal mean acts done by an Adminiſtrator, which are for the Inteflates benefit; but forſmuch as theſe Goods were not converted or employed for the Inteflates uſe, it is reaſonable that he ſhould be charged for them. *Popham* and *Fenner e contra*. For the Adminiſtrator hath an abſolute Intereſt and Power to diſpoſe of the Goods, until the Repeal be made; and it is not like unto an Appeal upon a Sentence, for that makes it as no Sentence; but the Repeal of the Letters of Adminiſtration doth not void it *ab initio*, and make a lawful act Tortious, but rather in this Caſe the new Adminiſtrator ſhall have an account for the Money received: and the words in the Sentence are not to be regarded, for they are common and ordinary in all Sentences. So he having the Goods lawfully, and converting them lawfully, ſhall not answer for them as for a Tort done. And *Popham* here ſaid, If Adminiſtration being committed, the

Ordinary commit new Administration, it is a Repeal of the former without any Sentence of Appeal, and if the first Administrator waste the Goods, the Debtee shall have the Action against him; and if he pleads that Administration is committed over, he may well by this Replication maintain it, because he wasted the Goods when he was Administrator, wherefore, &c. *Et Adjournatur*; but afterwards the Action was discontinued by the Plaintiff.

The granting of Letters of Administration to one, after another hath administrated of his own wrong, doth not take away the benefit of a Consideration vested in a Stranger; therefore he that hath cause of Action vested in him, against an Executor of his own wrong, shall not lose it afterwards by the granting of Letters of Administration to another.

Keeble *vers.* Osbaston. Trin. 12 Jac.
C. B. Hob. Rep.

Debt against one as Administrator to N. upon an Obligation; the Defendant shews the Custom of *London* to be, That if a Contract be made by a Citizen, to pay Money to another Citizen, and he who made the Contract dies, that his Executors or Administrators shall be chargeable therewith, as if it were upon an Obligation; and shews further how the Intestate was indebted upon a Contract to A. who had recovered against him, and that he had *Riens ouster en ses maines, &c.* And that it was thereupon demurred. *Glanville* moved, that this Custom was not good: For, 1. It is against Law, That an Executor or Administrator should be charged upon a simple Contract, wherefore, &c. *Daniel e contra*, The Custom was always to bind the Executors or Administrators to pay Debts upon Contracts, and Customs in *London* are confirm'd by Parliament, and are now as strong as a Statute; and therefore in *London* they prescribe to give Land in *Mortmain*, which is against Statute Law, and there is not any Custom, but that it deprives, and is against the Common Law in some point. And this Custom is reasonable; for a Debt upon a Contract is as well due as a Debt upon an Obligation, and therefore there is as great reason for the Payment of the one, as of the other; although the Law hath given a greater Prerogative, *viz.* a Priority of paying the one, rather than to the other, &c. *Owen* Justice. The Custom is reasonable; for the Executor in Conscience is bound to pay debt upon a Contract as well as upon a Specialty; and such a matter was about four years since in this Court, but not adjudged. And of that Opinion were the other Justices, especially as this Case is, being executed against him who is liable and chargeable by the Customs of *London*. The like Case is elsewhere since reported, That an Action of debt upon a Contract made by the Testator lieth not at Common Law against an

an Executor or Administrator, but by the Custom of *London* it is otherwise; of which Custom the Courts of *Westminster* ought to take notice. Mich. 12 Jac. B.R. Sprink *vers.* Tenant. Roll. Rep.

Adjudged *per totam Curiam*, That where an Executor is Plaintiff for any thing touching the Testament, and is Non-suit, or Verdict pass against him, he shall not pay Costs, by the Statute of 4 Jac. For the Statute ought to have a reasonable intendment, and no default can be presumed in the Executor who complains, because it concerns other Mens Fact, whereof he can have no perfect knowledge; and so it was resolved and adjudged by all the Justices of the Common Pleas. *Quod Nota.* A Judgment establish'd by both Courts, contrary to some few Precedents which were in *B. R.* to the contrary. *Quod Nota.* Mich. 7 Jac. B.R. Yelv. Rep. Executor ne paiera Costs sur le Stat. 4 Jac.

C H A P. XXIV.

Of Assets charging Executors, or not.

1. *What Assets are, and the several Qualifications thereof.*
2. *Whether Damages recovered by an Executor be Assets.*
3. *Mortgages redeemed by the Executor, and Chattels reverting to him upon failure of some Condition by the Legatary to be performed, are Assets in his hands.*
4. *Encrease gotten to Executors by Merchandizing with the Testators Good, and other things never in the Testators possession, are Assets in the Executors.*
5. *Debts due to the Testator are no Assets in the Executor, till recovered or released by him.*
6. *Whether Land devised to be sold for payment of Debts and Legacies be Assets.*
7. *An Executor dying indebted, and leaving to his Executor such Goods as he had as Executor, these are not Assets in such Executors Executor liable to the last Testators Debts.*
8. *Whether an Adverson be Assets.*
9. *How real Chattels may turn into personal Assets.*
10. *In what Case a Debtee-Executor may retain Money or Goods of the Testator, which shall not be held Assets as to other Creditors.*
11. *Other Mens Goods in the Testators possession at his death, shall not be Assets in the Executors hands.*
12. *Executors discharged of Assets as to so much as they pay of the Testators Debts with their own Money or Goods.*
13. *Certain Law Cases touching Assets.*

1. **A** SSETS are, where one indebted dieth Testate or Intestate, and his Executor or Administrator hath sufficient in Goods or Chattels, or other profits to pay the deceased's debts, or part thereof, and for so much he shall be charged: (a) So that all such Goods, Chattels and Actions which did belong to the deceased in right of Action or Possession as his own, and so continued to the time of his decease, and which after his death the Executor or Administrator doth get into his hands, as of right of his Executorship or Administration, and all such things as accrue to the Executor or Administrator, by reason thereof and nothing else, shall be Assets in their hands to oblige them in Law as chargeable to the deceased's Creditors or Legataries. So that all things valuable may be Assets; but such things as are not valuable are not

(a) Terms of Law, & Coke sup. Littl. 374.

not Assets. (b) Note, That Assets in the hand of any one of the Co-Executors shall be understood as Assets in the hands of all the Executors, (c) be it in any County or Place whatsoever. (d) All the Testators Goods and Chattels in Action, or in possibility at his death, and afterwards recovered by his Executors, are Assets in their hands, but not till recovered and come into their possession; therefore debts of any kind whatsoever due to the deceased, are not Assets in his Executors or Administrators hands to charge them until they be recovered: (e) But whatever an Executor or Administrator must sue for, by or under that Name or Appellation, is (being recovered) Assets in his hands. (f) Yea, notwithstanding an Executor or Administrator doth purchase the Fee-simple of that Land, whereof he had a Lease for years in right of the deceased (whereby the Lease is drowned) yet the said Lease shall still continue to be Assets in his hands. (g) Or if Executors do sell the Goods of Testators, and buy them again, they remain as Assets in their hands, because they are the same Goods which were the Testators. (b) If a Man hath a Lease for years, worth Fifty pound *per Annum* or more, out of which he pays Ten pound yearly Rent, and dies; in this Case, not the full value of the Land yearly, but only so much as is above the said Rent, shall be deemed Assets in the hands of the Executor or Administrator. (i) Or suppose the deceased dies possessed of Goods and Chattels to the value of Two hundred pound, and in debt to M. Two hundred pound, and to N. One hundred pound, and to O. Fifty pound, and to P. Twenty pound, and Composition is made with M. for Sixty pound, or other Sum more or less under Two hundred pound: In this Case the Executor is deemed to have Assets chargeable to the other Creditors for so much as is above the Sum so compounded unto Two hundred pound. (k) Or where a Man is indebted Forty pound to one, and Thirty pound to another, and dies, leaving but Forty pound in all, and his Executors agree with the Creditor of Forty pound for Ten pound, and have his Acquittance for the Forty pound, yet the Thirty pound remaining in their hands shall be Assets. (l)

2. If Executors do recover any Damages for Trespas, or other wrong done to the Testator, the Money recovered will be Assets in their hands, as well as debts recovered upon Bonds, or Bills, or Lands by them taken in extent upon Statutes, Recognizances, or Judgments. (m) Yea, without ever having these Monies, Executors may make them Assets in their hands, *viz.* by making Releases or Acquittances, or Acknowledgment of Satisfaction; for this amounteth to a Receipt, and chargeth the Executors towards the Creditors with the whole Penal Sum, though possibly they receive but part, as the principal, or some such proportion

(b) Coke sup Lit. 388.

(c) Kelw. 51.

(d) Coke 6. 47.

Cro. 2. 55.

Richardson *vers.*

Dowell.

(e) Co. sup. Lit. 124

5. 31. Broo. Affs.

24. Dyer 264. 121.

2 H. 4. 21. Co. 6. 58

Kelw. 63.

Dyer 362.

(f) Curia. Mich.

13. B.R. Co. 1. 93

Plowd. 84. 292

Coke 5. 34.

(g) Coke 1. 37.

Brook. Leases 63.

(b) 18 H. 6. 4.

(i) Brownl. Rep.

1 par. 35. 76. & 2

par. 47.

(k) 27 H. 8. 6.

(l) Fitzh. 27 H. 8. 6.

(m) So held in *Sale's*

Case of Damages in

Quia. Imped. reco-

vered. Contr. of the

Presentment.

portion: But Debts or Damages recovered by a Judgment had by the deceased in his life-time, whereof no Execution was, are not Assets in his Executors or Administrators hands, until Execution be made; yea, though Execution be made, and the Damages so recovered, that they be gotten into the Executors hands or possession, yet if the Judgment be erroneous, and the Execution avoidable, it shall not be deemed Assets in his hands; for which cause a Debt sued and recovered by one as Administrator to *A. B.* and afterwards a Testament made by *A. B.* produced and proved, is not Assets in the Administrators hands, because the Executor in the said Testament may recover it from him.

(*n*) Frowick 36 H.
7. 2.

(*o*) 21 H. 7.

(*p*) Case int. Chapman & Dalton. El. Reg. Plowd. Com.

3. A Mortgage redeemed is Assets, unless the Executors redeemed it with their own Money. (*n*) Likewise Goods of the Testators redeemed by the Executor with the Testators Money, are Assets in the Executor: It is otherwise, if the Executor having no Monies of the Testators, doth redeem them with his own Money. (*o*) If the Testator grant a Lease for years, or Horses, Sheep, Plate, or other Cattel unto *A.* upon some Condition that *A.* did not perform after the Testators death; in this Case the Chattel reverts and comes back to the Testators Executors, and is Assets in their hands. Also if *A.* covenant with *B.* to make him a Lease of such or such Land by such a day, and *B.* dieth before the day, and before any Lease made; now must *A.* make the Lease to the Executor of *B.* and the Lease so made to him shall be Assets in his hands, (*p*) because the Executor shall have the Term only as Executor: So if *A.* undertake to deliver in to *B.* Twenty Loads of Coals, Wood, or other Merchandize whatsoever, and this is not performed in the life of *B.* But afterwards to his Executor; this shall be Assets in his hands as well as the Money recovered in Damages for non-performing should have been. Likewise any Goods or Chattels whatsoever given or bequeathed to any person by the Testator upon a Condition certain, and the Condition not afterwards performed by such Conditional Legatary, the said Goods and Chattels conditionally bequeathed do revert to the Executor, and become Assets in his hands.

4. Encrease gotten to the Executors by Merchandizing with the Testators Goods, shall be Assets in their hands, and shall charge them. (*q*) Likewise Damages recovered by an Executor in an Action of Trespass, shall (as aforesaid) be Assets, and yet they were never in the Testator. (*r*) Also if a Lease be made to one for life, the Remainder to his Executors for years, and he dieth, this will be Assets in the hands of his Executors, though it never were in the Testator. (*s*) So where a Lease for years is bequeathed to *A.* for life, and after to *B.* who dieth before *A.* although *B.* never had this

this Term in him, so as that he could grant or dispose it, yet shall it rest in his Executor as his Goods, and be Assets in his Executors hands. (t) Likewise a Remainder for years, so in the Testa- (t) Ibid.

tor, that he might grant or dispose it at his pleasure, though the same fell not in possession to the Testator in his life-time, yet this is Assets to the Executor, even whilst it continues a Remainder, and before it falleth into possession, because it is presently valuable and vendible. In like manner Gain gotten by Trading (as aforesaid) with the Testators Money, Wool growing upon Sheep after the Testators death, also the encrease of Sheep or other Cattel after the Testators death, though never in the Testators actual possession, shall yet be Assets in the Executor. Likewise a Feoffment made to the Feoffors use for life, and after him to the use of his Executors or Assigns for a certain number of years, that number of years shall be Assets in the hands of the Feoffors Executor. Also Goods hypothecated or pledged to the deceased in his life-time, and not redeemed, or the Money thereof when redeemed, is Assets in the Executors or Administrators hands. Likewise the Money raised by the sale of the deceased's Lands, sold by his appointment by the Executors for the payment of his debts (as when the deceased did in his life-time appoint that his Executors shall sell his Lands to pay his debts) shall, as aforesaid, be Assets in the Executors hands.

(u) Also if Executors had a Villain for years, and the Villain purchased Lands in Fee, and the Executors entred, they had a Fee-simple, but it was Assets. (w) The reason was, because they had the Villain *in autre droit*, viz. as Executors to the use of the dead. And if Executors having Assets, do waste it, or pay Debts or Legacies in any other order or method than the Law hath prescribed, they must answer it out of their own Estates. (x)

5. Debts due to the Testator be not Assets in the Executors hands, so as to charge him for the payment of Debts and Legacies, until Judgment and Execution had, or they be otherwise recovered, received or released by him. And an Executor paying the just value of the Testators Goods to the Creditors, may retain the same Goods in his hands, which nevertheless shall not afterwards charge the Executor as Assets. But if question be concerning the value, it is received by all, that the value upon the Appraisement is not binding, nor much to be respected in a Contest at Law; for if it be too high, it shall not prejudice the Executor; if too low, it shall not advantage him; but the true value, as it shall be found by the Jury, when it comes in question, Whether the Executor hath fully administr'd, or hath Assets or not, is that which is binding in Law.

6. If a Man give Lands by his Will in Fee to his Executors to be sold for performance of his Will, these even before the Money

(u) Co. sup. Lit. 388
5. 34. Dyer 362.
Kelw. 63. Co. sup.
Lit. 54. 20 H. 7. 4.
Bro. Assets, 12.
(w) Co. sup. Lit. l. 2.
c. 11. §. 172. & 192.
D. & Stud. & Bro.
tit. Villenage, 70.
(x) Terms of Law.
& Co. 6. 46. Dyer
271.

- (y) 3 H. 6. 3. & 2 H. 4. 2. & 9 Eliz. Dyer 264. & 14 Eliz. Dyer 31. be raised, are Assets both for payment of Debts and Legacies. (y) But if the Land be given only for the payment of debts, they shall then only be sold for that purpose, and not for payment of Legacies: But the profits of the Land before it be sold are not in that case Assets; but let the Executor see to the sale thereof in due time limited and prescribed by Law, lest the Heir enter; for regularly the mean profits of Lands, devised to be sold, shall not till the sale be Assets in the Executors hands, unless it be otherwise devised by the Testator. (z) And although Lands devised to Executors for years, are Assets in their hands; yet if the Testator devise, that his Executors shall sell his Land, this is not Assets until the Land be sold, and the Money received for the same shall be Assets. (a) Notwithstanding what hath been here said in this point, and although Lands given for the payment of Debts and Legacies were Assets before the Statute of 21 H. 8. cap. 5. which says indeed, that if one Will by his Testament any Lands, &c. to be sold, neither the Money thereof coming, nor the Profits taken, shall be accounted as any of the Goods and Chattels of the Testator; yet since that Statute, viz. in the late Queens time, the Law was twice admitted still to be according to the Third of H. 6. viz. That Land given to Executors for the payment of Debts and Legacies is Assets, and so the Money thereof coming. (b) Likewise, if a Man make a Feoffment upon Condition, that the Feoffee shall sell the Land, and distribute the Money to the Testators use whereupon he selleth the Land, and the Feoffor maketh him his Executor, the Money received for the Land sold shall be Assets in his hands. (c)
- (z) Co. sup. Litt. l. 2. c. 3. §. 169. & l. 3. c. 5. §. 383.
- (a) Brownl. 2. p. 47.
- (b) 9 El. Dyer 264. & 14 El. Dyer 31.
- (c) Bro. Exec. 51. 2 H. 4. 21. & 3 H. 6. 3.
7. As the Goods which a Man hath as Executor to another, are not liable to be taken in Execution for his own debts, either upon Recognizance, Statute or Judgment had against him: So if such a one die indebted, leaving to his Executor such Goods as he had as Executor, these shall not be Assets in the hands of such Executors Executor, as subject to the payment of the last Testators Debts, but liable only to the payment of the Debts and Legacies of the first Testator. (d)
- (d) Plowd. Com. 525. int. Bransby & Grantham. P. 20 Eliz.
8. If the Grantee of the next Avoidance of a Church dies, after the Church becomes void, and before he presents: In this Case the Grantees Executor by presenting whom he please, shall not thence be understood to have Assets for the payment of the debts of such Grantee or Testator, for that legally no profit could be made of such Presentment; yet if in that Case a stranger should happen to present, and thereupon such Executor of the said Grantee in a *Quare Imped.* recover Damages, the Money of such damages so recovered shall be Assets. (e) Yet it is by good authority said, That an Advowson is Assets; (f) understand it of such Advowson
- (e) Sale's Case in C B Mich. 32 & 33 Eliz.
- (f) Co. sup. Litt. l. 3. c. 13. in fin. §. 712.

son as the Testator had for years, and is in the nature of a Chattel real, or an Advowson, or any other Hereditament, granted or devised to one and his Heirs for 100 years, more or less; if granted for life, it is but a Chattel. (1) But a Presentation to a Church shall not be accounted Assets, because not valuable. (2) For one simple Presentation to a Church, upon the next Avoidance, is said to be a real Chattel, and that if a Church of the Testators Inheritance, become void in his life, comes to the Executor as a thing in Action; but is not Assets, because not vendible: For where a Church becoming void, a Stranger presenting thereunto wrongfully, and the Patron died, it was resolved, That his Executor might maintain a *Quare Impedit*. (3) So that there may be certain Chattels which shall not turn into Assets; and therefore it is no Paradox in the Law, to say there are some Chattels, which though they come from Testators to their Executors, yet are not so in their hands, as wherewith they may be charged as with Assets: For suppose *A.* Patron of the Church of *D.* grants the next Avoidance to *G.* The Church becoming void, *G.* dies before he presents, his Executor having the advantage or benefit of preferring his Son or Friend, yet this shall make no Assets in the Executors hands for payment of his Testators debts; for that he could not lawfully make the Presentation Mercenary, by taking Money to present Simoniacally; or in case a Stranger usurping in the Patrons life-time, who then dying, his Executor recovers in a *Quare Impedit*, as in the Case aforesaid. Nor shall the Goods of an original and first Testator, which from his Executor come without any alteration of the Property to the Executor of his Executor, be any Assets in the hands of that later Executor, to make him chargeable therewith for the debts of the first Testators Executor: But a Seigniorship of Homage or Fealty, or in free Almoigne, is no Assets, because not valuable. (g)

(1) Plowd. Com. 5. 24.

(2) Coke on Littl. 388.

(3) Mich. 32 &

33 Eliz. C.B.

The Bishop of Coventry & Litchfield, & Sale's Case

(g) Ibid.

9. As the Testators Debtors Land after Execution taken by the Executor in extent, turns a personal Duty into a real Chattel, and into real Assets: So Money paid to the Executor by such a Debtor, for such an extent, or by a Mortgagee for a Mortgage of a Lease for years, turns these real Chattels into personal Assets, charging the Executor. Note, That Assets must be in state or interest, and not in use or right of Action, or right of Entry, for they be no Assets until they be brought into possession. *

* Co. sup. Litt. lib. 3. c. 13. §. 712

10. A Debtee making a Debtor his Executor, or dying Intestate, Administration is committed to the Debtor, this Debt as for so much shall still continue as Assets in his hands as to other Creditors; yet a Debtor making the Debtee his Executor, he may retain so much as to satisfy his own debt, and it shall not be deemed as Assets to any other Creditor. As suppose *A. B.* having

(*) *Barnet's Case*,
Hill. 8 Jac. Plowd.
184.

(b) *Coke* 5. 30.
Dyer 2.

(i) *Offic. Ex. fol.* 199

(k) *Kelway* 63.
Coke 6. 58. *Dyer*
362. *Dr. & Stu.*
lib. 2. cap. 3.

(l) *Goldsb.* 79.
Pl. 15.

(m) 6 H. 8. 2. *Dyer*
fol. 2. & *fol.* 187.

Goods to the value of One hundred pound dies Intestate, and obliged to C. and D. in One hundred pound apiece, the Administration of whose Goods is committed to E. F. and then afterwards C. dying, maketh the same E. F. his Executor: In this Case the said E. F. may retain the One hundred pound for satisfaction of his own debt, and it shall not be deemed as Assets in his hands, as to satisfy D. or any other Creditor. (*) But an Executor of his own wrong, to whom the deceased was indebted in a certain Sum of Money, entring upon so much of the deceased's Goods to the value of his debt, thereby intending to pay and satisfy himself, shall be held chargeable with so much as Assets in his hands, for the satisfaction of any of the deceased's Creditors or Legatees. (b) Likewise the Executors of an Administrator are chargeable, where he did neither pay the debts, nor leave the Goods to the Administrator, but otherwise disposed of them. (i)

11. Other Mens Goods and Chattels in the Executor or Administrators hands that were in the deceased's possession, whether he had or had not right to them, so as they belong not to the Executor, make not the Executor or Administrator chargeable, they being not Assets in his hands. For this reason, if another Man's Goods happen to be among the deceased's Goods, and they all, without distinction, come to the Executors or Administrators hands, this other Mens Goods shall not be Assets in their hands. Nor the Rents belonging to the Heir, though received by the Executor, any Assets in his hands; neither are the Goods and Chattels of a person deceased and out-lawed at the time of his death, any Assets in his Executors hands, because he was disinterested thereof by the Outlawry. (k)

12. An Executor having Goods of the deceased to the value of One hundred pound, taking up an Obligation of the Testators of the same Sum, and really paying the Money, is discharged from having Assets as to this to any other, for that the property thereof is now solely in himself. The Case is the same, if he surrender his own Body, or give the Body of another for him to the Testators Creditor for the debt; but a bare Promise made by the Executor, or another for him, to pay the Testators said debt, will not discharge him of Assets. (l) But if Executors do really pay the Testators debts of their own Goods, they may retain the Testators Goods to the same value to their own use. (m) So that the Executor paying the just value of the Testators Goods to his Creditors, may retain the same Goods in his hands, which shall not charge the Executor as Assets. Finally, this is a sure Rule, That where no fault is in the Executor, there he shall not be bound to pay more for his Testator than the Testators Goods do amount unto.

13. Action of Debt was brought against Executors, the Issue was, whether there were Assets in the hands of the Executors the day of the Writ brought : It was given in Evidence for the Plaintiff in the Action, That the same day the Sum of One hundred pound was paid to the Executors in the Prerogative Court, and presently by the Order of the said Court, the Executors paid the said One hundred pound to another Creditor of the Testator ; but the Opinion of the Court was, in regard the Money was once in the Executors hands, that payment of it over by the Order of the Court of Prerogative, was not to the purpose ; and therefore the same was adjudged to be Assets in their hands : But yet it was held, That upon special pleading of such matter, peradventure it might not be Assets in their hands, to pay another debt. (n)

(n) 4 & 5 Ml.
Dyer 208.

Debt upon an Obligation of 300 *l.* against an Executor, Assets were found in 200 *l.* and Judgment given in *B.R.* That the Plaintiff should recover his whole debt of the Testators Goods ; and after a Writ of Error in the Exchequer, and the said matter assign'd for Error : But by all the Justices *de Banco*, and Barons of the Exchequer, the Judgment was affirmed. (1)

(1) Trin. 12 Jac.
B. R. Lee *vers.*
Ridford. Rol. Rep.

One possessed of Lands held in Socage, did devise it to be sold by his Executors, and that the Money proceeding of the Sale thereof, should be disposed of by them in payment of certain Legacies specially bequeathed and appointed in the Will : The Executors sold the Land ; one of the Legatees, after the Will was proved, sued the Executors in the Spiritual Court for his Legacy, whereupon a Prohibition was prayed. In this Case it was resolved, 1. That the Money was Assets in the Executors hands. 2. That there was no remedy for it but in the Spiritual Court, and therefore a Prohibition did not lie in the Case. (2)

(2) Trin. 9 Eliz.
Dyer 264.

The Reversion upon a Term was granted to the use of the Grantor for life, and after his decease to the use of his Executors and Assigns for 21 years, the Remainder over in Tail. The Grantor was after attainted of Treason, and died Intestate, and without any Assignment thereof. In this Case it was held, That it was an Interest in the Grantor, and that the Queen should have the Term as forfeited : But it was also held, That if the Executors (supposing he had died Testate) should take any thing by it, they should not have it as Purchasers to their own uses, but should have it as Assets. (3) And here note, in that Case, this difference was put upon the Books of 2 *H.* 4. and 3 *H.* 6. If a Man enfeoffeth one or divers upon Condition, That they shall sell the Lands, and shall dispose of the Money for the good of his Soul, and he make them his Executors, and they sell the Land accordingly. &c. that the same shall not be Assets : But if it be of Land deviseable, or in use and be so devised to his Executors for his Soul, the same shall be Assets.

(3) Pasch. 14 Eliz.
Dyer 310.

Monies recovered in *Chancery* by an Executor or Administrator, are Assets in their hands. And it hath been held, That if an Executor make a gain of the Testators Money, the same shall be Assets in his hands. (4)

(4) Hill. 11 Jac. in C.B. Rot. 1963. Harcock & Wrenhams Case. Brownl. 3. par. 76, 77.

When an Administrator compounds with one who hath a Judgment of One hundred pound for Sixty pound, who offereth to acknowledge Satisfaction upon Record, and the other defers it to the intent to suffer it to stand in force to deceive a Creditor, this shall not hurt the Creditor, but he shall recover; and the Money remaining in the Administrators hands shall be Assets, notwithstanding such Composition. (o)

(o) Pasch. 8 Jac. in C.B. Turner's Case. Co. 8. par. 132.

(p) Pasch. 9 Jac. in C.B. Brownl. 1 par. 34. *vid. Hill.* 10 Jac. in C.B. Brownl. 2. part 47. Acc.

(q) Hill. 12 Jac. in C.B. Rot. 1963. Harcock & Wrenhams Case. Brownl. 1 par. 76, 77.

If I devise Lands to my Executors for Three years for the payment of my debts, and I make Executors and die, this is Assets in my Executors hands. But if I devise my Land to be sold for the payment of my debts, and I make Executors, and die, this is no Assets before the Lands be sold. (p) Also if an Executor doth make gain of the Testators Money, the same shall be Assets in his hands. (q)

It is not requisite, that every Assets be a thing in possession, or once in the hands of the Testator; for a thing may be Assets which was never in the Testators hands, if those things come in lieu of the things which were in the Testators hands, as Money for Land or other Goods sold. Also things in Action or Possession, certain or uncertain, if they be released, are Assets; the reason is, because by such Release is given away that which might have been Assets: And therefore if Trespass be done to the Testator in his life-time, for taking his Goods, and he dieth, and his Executors release all Actions, the same is Assets, because it might be proved to the Jury, That had the Executors not released, but had brought their Action of Trespass, *de Bonis asportatis in vita Testatoris*, that they might have recovered damages, which would have satisfied debts or Legacies; and therefore the Release of Executors in such Case shall be Assets. (r)

(r) Mich. 27 Eliz. in C. B. Ritley's Case. Godbolt 29, 30. *vid. Trin.* 13 Jac. in C.B. Foster & Jackson's Case. Hob. 59 & 60. Acc. *vid. Mich.* 15 El. Owen 36. adjudged Acc.

An Administrator may take the Goods which are given by the Intestate to defraud Creditors, for that the gift is void, and therefore they shall be accounted Assets. Also, if a Man doth administer as Executor, and then takes Letters of Administration, it is at the Election of the Party to sue him as Executor or Administrator. (s)

(s) Mich. 43 Eliz. in C. B. Bethel & Sir Edw. Stanhop's Case. Owen 132.

(t) Trin. 32 Eliz. in B. C. Hawkins & Laufe's Case. Leon. 155.

If a Testator mortgages a Lease for years, and dies, his Executors may redeem it with their own Money; and the Lease shall be Assets in their hands, for so much as the Lease is worth above the Sum which they paid for the Redemption of it. (t)

If a Debtee die Intestate, and the Ordinary commit Administration to the Debtor, whereby the debt is extinct, yet it shall be Assets.

Assets in his hands as to debts, because the Ordinary had no power to discharge the debt, as was agreed *per Curiam*.

If a Feme, Executrix to her former Husband, take another to Husband to whom her former Husband was indebted, the debt is extinct, and shall not be Assets.

It was held by all the Justices, That if a Feme Executrix hath a Term, and she take a Husband, who purchased the Reversion, the Term is extinct as to the Feme if she survive, yet in respect of all Strangers, she shall account as Assets in her hands.

Debt against D. as Executor, the Defendant pleads *plene Administravit*, and issue upon Assets; the Jury found, that he administered, and had Assets in Ireland: And whether that were Assets here, they prayed the discretion of the Court; and all the Justices (besides *Walmesley*) held, that it was well found; for they may find a thing in Ireland, and when they find that he hath Assets that is sufficient; and when they further say, in Ireland, it is idle and vain. It was therefore adjudged for the Plaintiff.

Debt against the Defendant as Executor of J. S. he pleaded, *Fully Administrated, &c.* and upon a special Verdict it was found, that J. S. made the Defendant his Executor, being then within age, and thereupon the Ordinary committed Administration to A. and B. who administered, and they had in their hands when the Defendant came to his full age, of the Goods of the Testator Six hundred pound, and the Defendant at his age proved the Will, and then released to A. B. all Actions. And it was adjudged, that it was Assets. *Anderson* said, The doubt was, because it was uncertain what he released, and for that only an account lieth; but here the certainty appeareth by the Verdict. And *Perrin* said, If an Executor doth release an account, and it is not certain what he shall recover, it is not Assets; but if it can appear or be proved, that so much was due, it is Assets. For the Law presumeth he hath received so much as he doth release; and the Plaintiff had Judgment. *Nota*, *Rhodes* said, That in 17 Eliz. it was ruled, that where one made his Last Will, and thereby willed, That none should have any dealing with his Goods until his Son came to the age of Eighteen years, except J. S. that by this J. S. was Executor during the minority of the Son; and that it hath been adjudged, that when as one upon his death-bed said to his Wife, That she shall pay all and take all; by this she was Executrix.

Debt upon an Obligation against one as Executor of A. the Defendant pleads *plene Administravit*, and issue thereupon; the Jury find a special Verdict, That A. made E. his Executrix; and died possessed of divers Goods, which made a fraudulent Gift of all her Goods to J. S. &c. and continued in the possession of them,

Trin. 7 Jac. B. Roll.
Abridg. tit. Exec.
lit. G. Hill. 29 Eliz.
Croftan *vers.* Read.
Mo. Rep. nu. 368.
Pasch. 5 Eliz. Mo.
Rep. nu. 157.

Hill. 1 Jac. C. B. Richardson *v.* Dowel.
Cro. Rep. par. 2. Pl.
28.

Mich. 27 & 28 El.
C. B. Brightman
vers. Rightley.
Cro. Rep. par. 3.

Hill. 37 Eliz. Willcox *vers.* Watson.
Cro. Rep. par. 3.

them, and took the Defendant to Husband, and died ; that the Defendant is possessed of part of these Goods, to the value of, &c. and paid Legacies ; and if those Goods should be found to be Assets in his hands, they found for the Plaintiff ; and if, &c. then for the Defendant. *Fenner* held, that they should not be Assets, for although being but fraudulent, it shall be said to be a void Gift against the Donor and Creditor, and so liable to his debt ; yet it is good betwixt the Donor and Donee, and shall not be Assets in the hands of any but the Donor or Donee ; but here the Husband is a meer Stranger thereto, wherefore, &c. But all the other Justices *e contra* ; for that by the Common Law (the Gift being fraudulent) they are liable to the Plaintiffs Execution : And *Popham* said, If the Gift were good against all but Creditors (as it is) then they belong to the Donee, and in his hands are liable to this debt ; and if the Gift be void, they remain to the Executors of the Feme, and then the Baron having taken them and paid Legacies, is chargeable by reason thereof as Executor *de son tort Demesne* ; and so those Goods *quacunq; via data*, are liable to this debt in whose soever hands they come, unless by Title *Paramont*, or by Sale *bona fide* ; wherefore it was adjudged for the Plaintiff.

That which is not Assets in an Executors hands, is not Assets in an Executors Executor ; understand it only of things under such Circumstances as *de Jure* ought not, and therefore cannot be Assets in the hands of an Executor : For in other respects, by virtue of the Continuation of an Executorship, that which never came to the Executors hands, and so no Assets in him, may be recovered by such Executors Executor, and in him be Assets as to the first Testator : But if the former Executor disbursed of his own Money for his Testator, the value of such Testators Goods, and die possessed thereof, leaving them to his Executor, such Executors Executor may well retain them without being accountable for them as Assets to the first Testator : But as such, he is accountable and responsible for them, to satisfy the debts and Legacies of the last Testator, whose immediate Executor he is ; and therefore where two persons were possessed of Goods as Executors, the one of them took the Goods into his own hands, and disbursed divers Sums of Money in *Charitable and Pious Uses*, amounting to more than the Testators Goods were worth, which he retained, converting them to his own use, and thereof dying possessed, made his Will and Executors. Whereupon the surviving Executor brought *Detinue* of the said Goods against the others Executors Executor, to the value of 100 *l.* Whereupon the Defendant pleaded the matter *supra* ; and it was adjudged, That the Retainer was lawful, and that these Goods now in the hands of the Executors Executor were not Assets, or Goods of the first

first Testator in the hands of the last Executor——*M. 2 Eliz. Dyer 187.*

Rent reserved upon a Lease of Land made by one who had the Fee, though after his death received by his Executors, yet is not Assets in their hands, because it belongs to the Heir to whom the Land in Fee descends; and therefore in *Debt* brought against Executors, they were at Issue, Whether Assets were in their hands or not? And the Jury found by special Verdict, That the Testator was seised of a House in Fee, and made a Lease thereof, and of certain Household Implements therein for years, rendering Rent to him, his Heirs and Assigns; and found, That the Executors after the Testators death, continually received the Rent, and prayed advice of the Court, if the same were Assets in the Executors hands; and the Opinion of the Court was, for that the whole Rent was to go with the Land in Reversion as *magis digne*, and so did belong to the Heir. (8)

(8) Hill. 20 Eliz.
Dyer 361. *vide*
Plowd. Com. 114.
& 259. Acc.

Goods pledged or pawned by a Testator, and after his death redeemed by his Executor to the full value, with the Executors own Money, is not Assets in the Executors hands; and therefore where *Debt* was brought against Executors, who pleaded, That they had fully Administred: The Plaintiff gave evidence, That they had Goods in their hands; the Defendants shewed, That the Goods were pledged by their Testator, and that they had redeemed them to the full value with their own Money; and that for the rest of the Goods, that they had paid for them to the Testator, as much as they were worth: It was held, That the same did well maintain their Issue of *Fully Administred*; for that an Executor shall by way of Retainer be recompenced that which he hath of his own Money paid for his Testator. (9) But an Executor of his own wrong cannot retain Goods, but they shall be Assets in his hands.

(9) 6 H. 8. Dyer 2.
20 H. 7. Kelw. 58.
vid. Co. 5. p. 35.
Coulters Case.

Scire facias against S. as Executor of F.V. upon a Judgment given against the Testator of Two hundred pound, he pleaded payment of Forty pound debt due to the Queen, and besides that he had *Riens in ses mains*. And thereupon they were at Issue, Whether he had Assets? And it was found by special Verdict, That the Testator was possess'd of divers Goods, to the value of Two hundred and fifty pound, and by Covin to defraud his Creditors, made a Gift of his Goods to his Daughter, with a Condition of payment of Twenty shillings, that it should be void, and died. The Defendant intermeddled with the Goods, and afterwards the Daughter by this Gift took the Goods; and after that Administration of the Goods of F.V. was committed to the Defendant; and whether upon this matter he shall be charged as Executor, and that those Goods should be Assets in his hands? was the Question. And after Argument

Hill. 41 Eliz. Be-
thel *ver.* Stanhope,
Cro. Rep. par. 3.
& Owen 132.

ment it was adjudged for the Plaintiff. For first, when he meddled with the Intestates Goods, although he were neither Executor nor Administrator, and afterwards Administration was committed unto him, a Creditor hath election to charge him as Executor or Administrator; especially here when he pleads as Executor, the finding by the Jury, that he is Administrator, is not to purpose, 9 Ed. 4. 53. 2 R. 3. 20. 21 H. 6. 8. Secondly, all the Court held, That this Gift of the Goods is in it self fraudulent, as appears by the Condition; and the Covin is expressly found by the Jury, and then it is utterly void against the Creditors, by the Stat. of 13 Eliz. and the Intestate died possessed of them; and when afterwards the Donee took them it was a Trespass against the Administrator, for which he hath his remedy, and they are always Assets in his hands. But if a Trespasser takes Goods from a Testator in his life-time, so as they never were but a *Chose in Action* to the Executor or Administrator; they be not Assets until they be recovered: Wherefore notwithstanding the taking of them by the Donee, yet they always remained as Assets in the hands of the Administrator, and therefore he is chargeable for them as Executor *de son tort*, by his intermeddling with them before Administration committed, and the Goods by Law remained always in his possession. Wherefore it was adjudged for the Plaintiff.

If there be two or more Executors, albeit the *Assent* of any one of them be sufficient to perfect and execute a Legacy, yet if after there want *Assets* to pay the Testators debts, that Executor alone who so *assented* shall be responsible *de Bonis propriis*. (1)

A Legacy of 100 *l.* is bequeathed to *A.* who threatneth the Executor, having Goods of the Testators in his hands to sue him for it; whereupon the Executor doth promise *A.* to pay it him, if he will forbear him. In this case *A.* may sue the Executor without Averment of Assets in his hands, for it shall be presumed. (2) For such a Promise is an implicit Confession of Assets: But a Confession of an *Action* after a *plene Administravit* pleaded, is no Confession of Assets. (3)

Damages recovered by Executors for a wrong done to themselves, in pursuance of their Testators Will, may be Assets. (4) And damages by them recovered for an Escape of a Prisoner, shall be Assets. (5) So shall a debt released as well as received; (6) but not any of the Heirs Rents received by the Executor, (7) nor the Money upon the sale of Lands disposed to certain uses. (8)

There may be a Case, wherein the thing that came to an Executor or Administrator in right of the deceased, may in Law be extinct and gone as to them, and yet have its *Being*, and be accounted Assets as to Creditors and Legatees: As for instance, An Executor

(1) Hill. 9 Jac. B. R.
Bothe *vers.* Hampton.

(2) Hob. 178.

(3) Hob. 38.

(4) Ibid. 39.

(5) Ibid. 59, 66.

(6) Hob. 40.

(7) Idem. 265.

(8)

cutor or Administrator, in right of the deceased, hath a Lease for years of Land, he doth afterwards purchase the Fee-simple of this Land: Now is the Lease in Law *extinct* and drown'd as to the purchasing Executor or Administrator, notwithstanding, as to Creditors and Legatees, it shall still continue and remain as Assets (9)

If *A.B.* having Goods to the value of 100 *l.* and being obliged to *C.* and *D.* in 50 *l.* apiece, die Intestate; and after *D.* doth Administer to the Goods of *A.B.* and then *C.* die, and make the same *D.* his Executor: In this case *D.* may retain this to satisfy his own Debt, and it shall not be said to be Assets in his hands as to any other. (10)

If an Executor in an Action of Debt brought against him, make a false Plea, as, that he hath nothing of the Testators in his hands; and it be found against him, though to a sum of less value than the Debt sued for, he will be condemned in the whole: And therefore in Debt against Executors upon a Bond of 200 *l.* where the Defendants pleaded, That they had nothing in their hands: The Jury found, That they had Assets to the value of 172 *l.* it was resolved, That the Plaintiff should recover the whole Debt of 200 *l.* and Costs and Damages of the Testator, if, &c. and if not, then of their own Goods: For upon the Plea in Bar the Plaintiff may pray his Judgment presently. (11)

An Action of Covenant was brought against the Executrix of the Assignee of Lessee for years, for non-payment of Rent, upon the words [*Yielding and Paying*]; and in this it was held, That the words (*Yielding and Paying*) did imply an express Covenant, and it is not only a Covenant in Law. It was also held That by her entry she shall be accounted a true Executrix: And if one enter as Executor upon a Term, he shall have the Term, if the other will admit him to be a Termor, and he shall not be accounted a Disseisor to the Lessor, and to strangers he shall be accounted as Executor in Law, if they bring Actions against him, and the Term shall be Assets in his hands: And in the principal Case it was held, That the Executrix was chargeable with the Rent, because the Term is not in this Case determined, but continues. (13)

An Obligor made his Executors, and died; the Executors became bound to the Obligees for the payment of the said Debt; Whereupon the Obligees delivered up the Testators Obligation to his Executors; afterwards another of the Testators Creditors sued his Executors, who pleaded, That they had *Fully Administered*: Whereupon they were at Issue, and the Special matter aforesaid was found. It was objected by the Plaintiffs Council, That in this Case, the Executors had not made any payment or satisfac-

(9) Co. 1. 17.
Bro. Leases 63

(10) Hill. 8 Jac.
Barnet's Case.
Plow. 184.

(11) M. 4. Jac. B.
Mary Shipley's
Case. Co. 8 part
134.

(13) Hill. B. R.
Rot. 723. Porter
and Sweetman's
Case. Styles Rep.
406, 407

satisfaction of the Debt, but only had made a Bond to pay a sum at a day to come, before which day it might happen that the Obligation might be cancelled or released: And if such Plea should be good, then the Executors in such Case may make an Obligation to pay the Debt forty years after, and so defraud other Creditors: But all the Justices were clear of Opinion, That if in such Case the Executors make a sufficient Obligation to the Testators Creditors, and sufficiently discharge the Testator, without fraud or covin, that they may retain the Goods of the Testator for so much, and the Goods retained shall not be *Assets* in their hands: and although they have appointed *alteriorem diem* for the payment of the Money, yet this is not material, and Judgment was given for the Executors. (14)

(14) Pafe 30 Eliz.
C. B. Stamp and
Hurchings Case.
Leon. 111, 112.

That may be *Assets* in an Executor, which *in specie* was never in his Testators possession; the Executor being possess'd of what his Testator was never more than entitled to, is sufficient to charge him with *Assets*: And therefore in an Action of Debt against an Executor, where the Case was, That A. made the Defendants Executors: They being within Age, Administration was committed during their minority to J. S. and it was found, That during the minority of the Executors, there were Goods of the Testators in the Administrators hands to the value of 4000 *l.* and that the Defendants, the Executors, when they came of full Age, did release to the Administrator *durante minori etate*, all manner of Demands: It was then made a Question, Whether the said 4000 *l.* were *Assets* in the Executors hands? It was the Opinion of the Court, That it was *Assets* in their hands; and it was said, That it is not requisite, that every *Asset* be a thing in possession, or in the hands of the Testator: For a thing may be *Assets* in the Executors hands, if it come in lieu of a thing which was in the hands of the Testator. It was also held, That this Release of the Executors to the Administrator, was a *Devastavit* of the Goods of the Te-

(15) Mich. 27 E-

liz C. B. Rutley's
Case. Godb. 29.

stator. (15)
A Release made be an Executor of his own proper Debt due to him from the Testators Creditor, will so alter the property, for that value of so much of the Testators Goods, as that they shall not be *Assets* in the Executors hands, but shall be in the same Case as where a Debtor makes his Creditor his Executor, who may satisfy himself out of his Testators Goods, without being accountable for *Assets*, as to so much as his own Debt amounted. Regularly this holds true; yet there are certain Limitations and Cases in the Law wherein it may be otherwise: Understand it therefore where both the Debt and Release are without *Fraud* or *Covin*, and where the crediting Executors Debt owing to him, is of a legal equality with others: And therefore if he to whom the

the Testator was indebted in 50 l. be indebted to his Executor in (16) Pasc. 30 Eli so much, and the Executor in satisfaction of the Testators Debt, C. B. per. Anderson Chief Justice release the Debt due to himself, the property of so much Goods as in Case, Stamp & amount to that value, shall be presently altered in the hands of such Executor. (16) Hutchins. Leon. 111. 112.

CHAP. XXV.

Additional to the three last precedent Chapters, touching how far, and wherein Executors may be charged.

1. *Executors not chargeable upon a simple Contract of the Testators.*
2. *Actions of Account lie not against the Executors of the Accountants.*
3. *Personal Actions lie not against Executors as Executors.*
4. *Executors liable for no more than comes to their hands.*
5. *The Husband not liable for his Wifes Debts after her decease.*
6. *In what Case the Ordinary may be sued for the deceased's Debts.*
7. *How an Executor may make himself chargeable de Bonis propriis.*
8. *The method of proceedings where Execution is de Bonis propriis*
9. *Executors obliged, though not mentioned in the Obligations.*
10. *Contracts dissolved by Obligations after made.*

1. **W** Herever the Testator might wage his Law, there the Action lieth not against the Executor; (a) therefore he is not chargeable upon an Action of Debt upon a *simple Contract*; yea, though such a Debt grew for the most necessary things, as Meat and Drink, which bindeth even an Infant to payment, yet it will not charge the Executors of a man of full Age; so that though a common Host or Victualler trust his Guest, he loseth his Debt by his death. (b) Understand these things of Contracts only by word; for where the Testator in his life-time did put his Seal to any Deed or Writing made upon any such things this being then more than a simple Contract, taketh from the Vendee his wager of Law, and thereby chargeth his Executor: But if the Testator Seal only unto a Tally, or the like, with Scotches, expressing a Debt, this is no such specialty as shall charge his Executors. (c) And although no Action of Debt lieth against the Executor, as aforesaid, upon a *simple Contract*, yet may the

(a) 41 E. 3. 15. & 15 E. 4. 25. Except for the Kings Debtor by a *Quominus* in the Exchequer. Co. lib. 9. fol. 98. So of Accounts. (b) Coke 9. fol. 87. 22 H. 4. 23. But if the sum be written on it, they are bound as by a Deed 28 H. 8. Dyer 23. a (c) Offic. Exec. Of Contracts personal.

(d) Slades Case.
Coke lib. 4. &
lib. 9. 87 Pin-
chons Case.

Vid. cap. 23.
Caf. penul.

(c) Co. sup. Littl.
lib. 2. c. 5. Sect.
125. F. N. B. 117
(f) Rot. Parl.
50. E. nu. 123.
Co. ibid.

(g) Co. sup. Littl.
lib. 2. cap. 5.
Sect. 123.

(i) Mich. 13. Jac.
B. R. Rol. Rep.
Powel. verf. Har-
ris.

(k) Dr. & Sut.
lib. 2. cap. 10.

Creditor in that Case maintain an Action upon the Case grounded upon the Assumption implied, though not express'd. (d) And thus indeed the Executor is charged in substance or matter for a *simple Contract*, though not in manner for a Debt, but as for breach of promise making recompence in damages instead of the Debt. Yet by the Custom of *London*, Executors are chargeable upon a *simple Contract* of their Testators: Presidents whereof you have in the Case of *Snelling* against *Norton*; as also in *Spink's* Case against *Tenant*.

2 No Action of Account lieth against Executors (except for the King) that is against the Executors of the Accountant; (e) Nor indeed at the Common Law for the Executors of him to whom the Account is to be made, but that is help'd by Statute. (f) For Executors could not have an Action of Account at the Common Law in respect of the privity of the Account; but the Stat. *W. 2. cap. 23.* hath given an Action of Account to Executors; the Stat. of 25 *Ed. 3. cap. 5.* to Executors of Executors: and the Stat. of 31 *Ed. 3. cap. 10.* to Administrators. (g) And as an Executor is not chargeable in an Action of Account, as aforesaid; so neither is he chargeable in an Action of Detinue, nor of Account (except to the King) for the Testators detaining and not paying or answering things received, or under his charge or custody. And as a Writ of Account lieth not against Executors, nor Administrators chargeable in the nature of an Account: So Executors are not chargeable for a *Trust* in their Testator, unless the thing trusted come to the Executors hands, and unless they have Assets, they are not chargeable for such *Trust*: It is therefore contrary to Law to force an Executor to Account in a Court of Equity, unless for the King. (i)

3. Although Executors are in Law understood as the Representatives of their Testators persons, yet if the Testator in his life-time commit any Trespas, either upon the Person, Lands or Goods of another, no Action lieth against his Executor for the same; the reason is, *Actio personalis moritur cum persona*, as hath been formerly declared: Hence it is, that there is no remedy in Law to compel Executors, though they have Assets to make satisfaction of a Trespas done by the Testator in his life-time; for every Trespas dieth with the person. (k) And therefore also it is, that no Action lieth against the Executor of him, who in his life-time carried away his Corn, Hay, &c. without setting forth the Tenth, and died before recovery had against him for the same, although during his life the treble value were recoverable against him in an Action of Debt; and this holds true, though the Testator were a Lessee for years, so as his state come to his Executors. The Law is the same, and upon the aforesaid Reason and Rule in Law, if a Lessee

Lessee for years commit waste and die, no Action lieth against his Executor for this waste. Yet the Law is otherwise against Executors of Ecclesiastical persons, in case of Dilapidations; for if a Parson or Vicar do suffer the Buildings of his Benefice to go to decay, and dies, his Executors are liable by the Spiritual Law to the Successors Suit.

4. An Executor shall not be charged with, nor in respect of any other Goods than those which came to his hands after his taking upon him the charge of the Executorship, or by virtue thereof. And although the Executor of an Executor shall answer others to whom the first Testator was indebted, as much as he shall recover of the Goods of the first Testator; yet if that Executor did Alienate and Convert to his own use all the Goods which did belong to the former Testator: In this Case, no Action doth lie against the Executor of the Executor for recovery of any Debts due by the first Testator. Likewise where *A.* makes *B.* Executor; and *B.* makes *C.* Executor, there the Goods which came from, or were left by *A.* be not in the hands of *C.* liable unto the Judgments had against *B.* Nor on the other side, are the Goods of *B.* in the hands of *C.* subject to the Judgments had against *A.* And the like is to be understood of Statutes, Recognizances and Bonds. Also By the Laws of this Land, an Executor shall not be charged by any Enquest made by his Testator of the Goods that did belong to another man. Indeed by the Civil Law it is otherwise, for there it is lawful for the Testator to bequeath another mans Goods, which the Heir at the Civil Law must buy, or pay the value thereof, if the Owner will not sell them. Which Law, by [*another man's Goods*] intends, That which is neither the Testators, nor the Executors, nor the Legataries: And the common Distinction in this Case is, That if the Testator, when he made his Will, did know the thing bequeathed by him, to belong to another man, the Executor is chargeable therewith, or the value thereof, (1) otherwise not. (2) Nor if the Testator, when knowing it to be another mans, did notwithstanding bequeath, it, in hope that it should be his own when the Owner thereof died: For in that Case his Executor is not chargeable therewith to the Legatary, in case the Testators hope therein prove but a vain hope. (3)

(1) *L. non dubi. um. §. ult. ff. de Legat. 3.*
 (2) *Graff. §. Legatum. q. 14 nu. 2. Menoch. de Præf. lib. 4. Præf. 116. Cujac. ad Lég. virum ex familia*
§. si rem tuam. De Legat. 2. & Text. in L. cum. alienam. C. de Legat. (3) Roman. si ag. 741. Tepat. tit. de Legat. in genere. cap. 23.

5. If a Woman in Debt marry, and die before the Debt be recovered against her, though leaving to her Husband much more than the value of the Debt, yet is he not liable in Law to pay one peny of her Debts after her decease, because he neither is her
 Executor

(i) Ridl. View of
the Civil Law
part. 2. cap. 2.
Sect. 4.

(k) Offic. Exec. c.
17. Sect. 1.

(l) Fitz. N. B.
120. D.
(m) 9 E. 4. 34.
(n) 8 Eliz. Dyer.
247.

(o) 2 H. 6. 12.
Dyer 185. 80.
Coke 9. 90, 94.
H. 6. 57. 34 H. 6.
45. Bro. Exec. 141.
145. Littl. Bro.
Sect. 29. Kelw. 61.
Bro. Exec. 164.

nor came to her Goods by wrong. (i) Inſomuch, that a Woman indebted One thouſand pound, and having Leaſes and other immoveable Goods, to the value of Three or Four thouſand pound, marrying with *A. B.* and then die before the Debt be recovered againſt her : In this Caſe the Husband ſhall have all the value of his Wife's Eſtate, and yet in Law not be liable for her Debts ; during her life he is liable, but not afterwards. (k) This ſeems a defect in the Law, whereby Creditors are at a loſs without remedy ; therefore let them ſue in her life-time, for *Lex fit vigilantibus non dormientibus.*

6. If a man be indebted and die Inteſtate, or if the Executors of one who hath made a Will reſuſe to be Executors, whereby the Goods do come to the hands of the Ordinary, the Creditors may have a Writ of Debt againſt the Ordinary by the Stat. of *Weſt.* 2. cap. 19 (l) and in this Caſe he muſt be ſued by the name of Ordinary. (m) But after Adminiſtration committed, the Ordinary ſhall not be ſued. (n)

7. An Executor may make himſelf chargeable of his own proper Goods, either by *Omiſſion* or by *Commiſſion* : By *Omiſſion*, when he being ſuing upon an Obligation, or the like, there being at the ſame time a Judgment in force againſt him or the deceaſed, and hath but juſt enough in his hands to ſatiſſie that Judgment, yet doth not plead this in Bar of the preſent Action, but ſuffers the Plaintiff to recover againſt him ; in this Caſe he muſt ſatiſſie the ſecond Debt out of his own Eſtate : Or by *Commiſſion*, as when he doth ſomething that is a waſte in him, and thereupon a *Devastavit* in return againſt him, In which Caſe, he muſt answer as much as he waſted out of his own Eſtate, or when a ſuit being againſt him, he pleads ſuch a falſe Plea therein as tends to the perpetual Bar of the Plaintiffs, Action, and yet being of a thing within his certain knowledge, as when he pleads he is not Executor, nor ever Adminiſtred as Executor ; and upon tryal of this Iſſue it be found againſt him, that he is a lawful Executor, or Executor in his own wrong : In this Caſe, he muſt ſatiſſie the Debt out of his own Eſtate, whether he hath Aſſets or not, and the Execution had upon the Judgment ſhall be levied upon his own proper Goods.

(o) Likewise, if an Executor or Adminiſtrator ſued, doth plead to the Action *plene Adminiſtravit*, and upon Tryal it be found againſt him : In this Caſe, if he have any of the deceaſed's Goods left in his hands, the Execution ſhall be of them ; but if he have none ſuch, then the Execution ſhall be, and he ſhall be charged for ſo much as is found to the value thereof to be in his hands, of his own proper Goods : But where one is ſued upon a Promise made by the Teſtator, and he plead, *non Affumpſit* to it ; or where he is ſued upon a Deed made by the Teſtator, and he plead, *Non eſt*

Factum

Factum to it, or the like; and these Issues upon Tryal are found against him; or when he shall confess the Action, or suffer a Judgment to pass by default against him, or plead any vain Plea: In all these Cases he shall not be chargeable of his own Estate, neither shall the Judgment and Execution in these Cases be *de bonis Propriis*, but *de bonis Testatoris* only for the Debt, and *de bonis Propriis* for the Costs. And yet if an Executor or Administrator shall intreat a Creditor to forbear his Debt until a day, and then promise to pay him; by this promise he hath made himself chargeable as for his own Debt, howbeit it shall be allowed him upon his account. And if a Debt be recovered against one who died before Execution sued, leaving Goods sufficient to satisfy; then shall not the Land descended to the Heir be charged therewith, nor by like reason any Land conveyed after Judgment. Or if a Creditor be made Executor by his Debtor, and pay himself part out of the Goods, he cannot sue the Heir for the rest, because the Debt can not be apportioned: But otherwise he may. (p) But if an Heir (p) *Offic. Exec p.* plead, *Riens per descent*, and it be found against him that an Acre ^{142.} of ground descended to him, Judgment will be entred for the whole Debt, though Execution shall be only on that Acre. And therefore if a man's Heir be sued for 1000 *l.* being his Father's Debt, and the Heir plead, *Riens per descent* from his Father in Fees, and it be found by Tryal, that he hath one Acre descended to him from his Father in Fee, the Heir shall be charged to pay the 1000 *l.* because of his false Plea; for he had the perfect knowledge what Land he had by Descent: But nothing shall be put in Execution for the 1000 *l.* but this Acre of Land. (4)

(4) 34 H. 6. f. 12.

8. In all Cases where a man is charged of his own Estate, and the Execution be *de bonis Propriis*, the Judgment is ever, *de bonis Testatoris*. And the method or form of Proceedings in such Cases, is this, *viz.* The first Execution is against the Executor *de bonis Testatoris*, and not *de bonis Propriis*: And after a *Devastavit* return'd by the Sheriff, and not before, against the Executor or Administrator, a new Execution is directed to the Sheriff to levy the Debt *de bonis Testatoris*; and if there be none of them to be found in his hands, then to levy them *de bonis Propriis Executoris vel Administratoris*: Therefore if an Executor or Administrator be sued by a Creditor, and the Executor or Administrator plead *plene administravit* generally; or plead specially, that he hath no more but to satisfy a Judgment, or the like; and upon Tryal this Issue be found against him, and that he hath in all, or in part, enough to satisfy the Debt: In these Cases, the Judgment is *de bonis Testatoris*, and thereupon an Execution is, as in other Cases, to levy the Debt *de bonis Testatoris* in the hands of the Executor or Administrator, and the Costs *de bonis Propriis*. And upon the Return of the Sheriff a

(special

(q) Atworth's
Case. Mich. 38, 39.
Eliz. 34 H. 6. 45.
46 Ed. 3. 9. Fitz.
Executor. 9 Coke
5. 32 8. 134. Dyer
185. 32.

(r) Brownl. Rep.
2 part. 24. 33.
50. 76. 78. 116.
2 part. 187. &
Dyer 210.
(i) 11 H. 4. 70.

Trin. 17 Jac.
Chandler vers.
Thompson. Hob.
Rep.

special Execution doth issue forth to levy the money *de bonis Testatoris*: And if it appear that he hath wasted the Goods, then that he shall satisfy the Execution *de bonis propriis*. And hereupon also the Plaintiff may, if he please, have a *Capias* against the Body, or an *Elegit* against the Lands of the Executor or Administrator; and other course of Proceedings cannot, nor may be had in this Case against the Executor or Administrator. (q) But a Suit commenced against an Executor as Administrator, or against an Administrator as Executor, will prove invalid; for neither the one nor the other is chargeable with the payment of Debts or Legacies in such an Erroneous Suit. But where an Action of Debt was brought against two Executors, whereof the one appeared and confessed the Action, the other making default; thereupon Judgment was given to recover against them both *de bonis Testatoris* in their hands, and Execution accordingly: And upon this Execution the Sheriff returned a *Devastavit* against that Executor only that made default, and hereupon a *Scire Facias* went out against him alone, and afterwards an Execution against him alone *de bonis Propriis*. (r) And in a *Fieri Facias* upon a Recovery against Executors, the Sheriff returning a *Devastaverunt*, a Writ of Execution issues against the deceased's Goods; and if there were none such, then against the Executors Goods; (s) But suppose an Executor be limited, as such, only for a time certain, and during that time he waste the Testators Goods: The Question is, How the Creditor shall be relieved? or, How the Executor shall plead after such time expired? To this purpose, is that Case between *Chandler* and *Thompson*. The Case was this, *viz.* C. against T. Executor of M. Debt upon an Obligation of the Testators; The Defendant pleads, That the Testator made him Executor till J. M. should come to 21 years of age, and in the mean time to keep all his Goods for him and then to deliver them unto him, and the said J. M. then to be Executor; and shews, that before the Writ, J. M. was 21 years of age, and that he delivered him the Goods, which he accepted *Abq, hoc, quod ipse est, vel die impetrationis, &c. fuit Executor, &c.* It was debated by the Court, if the Executor sold or wasted the Goods, how the Creditor should relieve himself for those Goods, the new Executor taking upon him the Executorship; for the Goods never came to the hands of the new Executor, though perhaps he may have an Action against the former Executor, for so much as he did not lawfully Administer; for against the Vendees he can have no remedy, or else the old Executor may remain an Executor still for that purpose, the other being none in effect for those Goods: Like the Case of a Sheriff that doth not deliver his Prisoner that he hath in Execution, to the next Sheriff.

But of this there is no fear or hazard at the Civil Law, for by that Law, albeit an Executor may be appointed under a Condition yet he cannot be instituted from a time certain, or only to a certain time; (1) which is not yet otherwise to be understood than thus, *viz.* The Executorship it self shall notwithstanding remain and be good, but the circumstance of time added there, or joyned therewith, shall be so rejected, as if the appointing of the Executor had been only pure and absolute, and without any Adjec-tion or Limitation of time at all: Otherwise it is where the appointment of the Executor is conditional, whereof no Accomplishment, no Executor; and the reason in Law of this Diversity why the *Time*, and not the *Condition* is rejected, doth arise out of a Rule in that Law, contrary to the practice with us, *viz.* that no man can die partly Testate, and partly Intestate: (2) Both which must be the necessary consequence of appointing a sole Executor from a certain time: Otherwise it is, if it be only under a Con-dition that he be not Executor till after the Condition be accom-plished; which (according to that Law) imports, That from and after the Accomplishment thereof, he is understood as the Execu-tor, even during the time precedent to the Condition: (3) By which [*Subintelligitur*] there is a *Salvo* provided to prevent a Contraction to the aforesaid Rule in Law, so diametrically op-posite to the practice with us.

(1) §. Hares & purc. Inst. de Hære. Instit. & Ihered. itas. ff. de hære. Instit.

(2) §. Hereditas. ff. eod.

(3) Fran. de Bar. de Succes. Test. & Intest. lib. 2. c. 2. nu. 1. tom. 1.

9. If one by Bond or Covenant oblige himself to pay such a sum of money at such a day, not mentioning his Executors at all, yet is the Executor also bound as included in the name or per-son of the Testator. For if a man bindeth himself, his Executors are also bound, though they be not named in the Bond; but so it is not of the Heir. (1) And in this respect the Executor doth more actually represent the person of the Testator, than the Heir doth the person of the Ancestor. So that every Bond or Covenant by the Testator made for payment of money, or the like, though he doth not Covenant for, nor bind himself and his Executor by exprefs words, reacheth unto his Executor also, although he be not named. And yet the Heir is not bound if he be not ex-prefly named by the word *Heir*, though there be never so great Assets or Land descended to him. And although Executors do so represent their Testators persons that they stand liable for their Dets, though not mentioned in the Bonds; yet where a man is bound that he will not sue upon such a Bond, and dies, if his Executors afterwards sue, this is held to be no forfeiture of the Bond. (u) So where one is bound to pay Ten pounds within a month after Request made to him, and he dies before Request made, it sufficeth not to make it to the Executor. (w) And al-though in a Judgment had against a Testator in his life-time, no

(1) Co. sup. Litt. lib. 3. c. 5. Sect. 337. in fin.

28 II.8. Dyer 118. & 22.

(u) Offic Exec. p. 156. 27 II.8. 26.

(w) Ibid. & Man-wood. 15 & 16.

mention be made of his Executors, yet are they liable in that Case ; for to Debts upon Record, and Debts and Damages already recovered against the Testator, and to Debts by Recognizance, the Executor is liable, though he be not named. So likewise do Executors stand charged with other inferiour Debts upon Record, as, Issues forfeited, Fines imposed by Justices at *Westminster*, or at *Attizes*, Quarter-Sessions, Commissioners of Sewers, and the like.

10. An Obligation made after a Contract dissolveth the Contract. So that if a man do make a Contract to pay certain money for a thing bought by him, if he make an Obligation for the money, the Contract is discharged, and he shall not have an Action of Debt upon the Contract. (x) And therefore if *A.* and *B.* do bargain with *C.* to pay him One hundred pound for Corn or other things; and afterwards *C.* taketh some Writing Obligatory of *A.* only, and then *B.* dieth: In this Case the Executors of *B.* are discharged, because they stood charged only by the Contract, which is extinguished by the said Specialty; for such Writing Obligatory doth determine or drown any duty by a meer Contract, because Specialty is of a higher nature. And although an Executor not named in the Obligation, be notwithstanding bound, as afore-said, supposing also that he that is named in the Testament, hath in due form proved the same, yet is he not thereby liable or obliged to satisfy the Creditors of the deceased, as one that hath Administred, unless also he hath paid the Fees due for the same out of the Goods of the deceased.

Hill. 10 H. 8.
Cleydon vers.
Spencer. Mo.
Red. nu. 3.

It was adjudged, that if an Executor pay a Debt of his Testators with his own proper Goods, he may retain as much in value of the Testators Goods. And 6 *Ed. 6.* in Debt by *Shelley* vers. *Sackville* Executor of *H. Brown*, he pleaded *plene Administrevit*, and upon Evidence the Plaintiff shewed, That the Defendant had a Farm belonging to the Testator in his hands, to the value of Two hundred Marks; the Defendant shewed how he had expended two hundred Marks in payment of the Testators Debt: And the Question upon the Evidence was, Whether the Defendants Plea was receivable? And upon Consultation with the Justices of *B. R.* it shall be received to maintain the Issue of *Fully Administred*, for so much as it amounted unto; because to make such a Retainer and Deduction, as to alter the property, is one and the same.

Mich. 15, & 16.
Eliz. Hunks vers.
Alberough. Mo.
Rep. nu. 242.

F. H. Executrix of *F.* brought *Detinue* of Goods against *A.* The Case was, *F.* had made a Will in writing, and thereby given many Legacies, and at the end of his Will gave the residue of his Goods to *F.* his Wife, whom he made his sole Executrix, for the payment of his Debts, and to dispose thereof for the wealth of his Soul. *F.* the Wife after takes *H.* to Husband, who made *A.* the Defendant his Executor, and died, and against *A.* doth *F. H.* bring

bring *Detinue* for the Goods of *F.* and it was adjudged for the Plaintiff, because *F. H.* doth not here take the residue of the Goods as a Devisee or Legatee, but as Executrix, by reason of these words, *viz.* [*For the Payment of his Debts, and for the wealth of his Soul.*] And the Justices held, That all works of Charity were within the intent.

C H A P. XXVI.

Of a Devastavit or Waste in an Executor or Administrator.

1. *What a Devastavit or Waste is, and in what Case the Writ of Devastaverunt doth lie.*
2. *How many ways a Devastavit or Waste may be committed.*
3. *An Executor or Administrator in a Devastavit or Waste is chargeable de Bonis propriis.*
4. *What acts do not amount to a Waste; also a Waste committed by one Co-Executor shall not charge another.*
5. *The manner of Proceedings against Executors or Administrators in case a Devastavit.*
6. *Cases in the Law pertinent to the premisses.*

1. **A** Devastavit or Waste in the Executor or Administrator is when he doth mis-administer the Goods and Chattels of the deceased, or mis-manage that trust which is reposed in him, either by the Testator, as to the Executor; or by the Law, as to the Administrator; and therefore the Writ of *Devastaverunt bona Testatoris* lieth against Executors for paying Legacies or Debts without Specialties, to the prejudice of Creditors that have Specialties, before the Debts upon the said Specialties be due. For in this Case the Executors are as liable to an Action, as if they had wasted the Goods of the Testator riotously, or without cause. (a) Likewise, (a) Cowel's Interpreter. verb. Devastaverunt. the said Writ lieth against Executors or Administrators, when they deliver the Legacies given by the Testator, or make Restitution for wrongs done by him, or pay his Debts due upon Contracts, or other Debts upon Specialties, whose days of payment are not yet come, &c. and keep not sufficient in their hands to discharge those Debts upon Record or Specialties, which they are compellable formerly by Laws to satisfy; or do deviate from that method or order enjoyned Executors by the Law in the payment of Debts and Legacies: In such Cases they shall be constrained to pay of

their own Goods those duties, which at the first by the Law they were compellable to pay, according to the value of that which they delivered, or paid by compulsion; for such payment of Debts or delivery of Legacies as is aforesaid, before Debts upon Record or Specialties, whose days of payment are already come, are accounted in the Law a wasting of the Goods of the deceased, as much as if they had given them away without cause, or sold them and converted them to their own use. (b)

(b) Terms of Law, verb. Devastaverunt.

2. From the premises it is evident, that a *Devastavit* or Waste may be committed several ways; more particularly thus, viz. When more is expended about the Funerals of the deceased, with respect had to his Estate and degree, than is meet and fit; when Executors pay Legacies in money, or assent to Legacies given in other things, before the Debts are paid, not reserving sufficient to pay the Debts also; when the Debts are not paid in that order and manner as the Law requires, but payment is made of that first which should be paid last, when there is not sufficient to pay all; when the Executor gives a Release of a Debt or Duty due to the deceased before his Receipt thereof; when he releases an Action whereby he might recover the deceased's Goods, or the value thereof; when he sells the deceased's Goods much under value, specially if in a fraudulent way, as, to his near Friends, to his own use, or to have money under-hand, or the like. (c) But be the Appraisement what it will, and let the Testator sell what he will, he shall stand chargeable to the best and utmost value towards the Creditors; but a Sheriff's sale of the Testator's Goods upon an Execution at an under-value, is no waste in the Executor. (d) If an Executor upon a Bond of Two hundred pound, forfeited for non-payment of One hundred pound, accept the principal, or Cost, or Damage, and give a Release or Acquittance of the whole forfeited Bond, or of all Actions, or upon Record acknowledge satisfaction upon Judgment had, this shall be a *Devastavit* or wasting of so much as the penal sum is more than is received by him, and so far his own Goods stand liable to Creditors not satisfied. (e) And so doubtless it is, if he do but give up the Bond, having no Judgment upon it though he neither make a Release, nor acknowledge satisfaction. The Law is the same in Case of releasing of Trespasses, or other causes of Action: As if one take away Goods from the Testator or his Executor, and he give a Release, this is a Waste, and makes his own Goods liable: Yet on the other side, if an Executor by payment of Two hundred and forty pound, or thereabouts, get in a forfeited Bond of Five hundred pound, it shall be an Administration but of Two hundred and forty pound, or of no more than he really paid. (f) Also the Executors verbal Agreement to require or sue for no more, or his giving

(c) Plowd. 543.
Coke 5. 32. Dr. &
Str. 75. Perk. Sect.
488. 570. Kelway
56.

(d) Offic. Exec.
p. 246.

(e) 13. Ed. 2. Fitzh.
91. Whether the
Executors or Ad-
ministrators of
the wasting Exe-
cutor dying be-
fore he hath an-
swered for the
Waste, shall be
charged. Q. Offic.
Exec. p. 253.

(f) 27 H. 8. 6. p.
Fitzh.

a Receipt for so much as he hath received, or delivering of the Bond into a Friends hands, or into a Court of Equity by way of Security to the Debtor that he shall not be sued for more, is no Devastation or Waste, since that the rest in Law still remains as due and suable. (g) And upon the Issue of *plene Administravit*, the Jury is to find whether the Executor hath Assets or not, and not whether a Devastation, for that must come in by the Sheriffs Return upon the *Fieri Facias*. (h) Again, the Executors submitting to Arbitrement, matters of Debt or Duty due to Testator or touching his Goods taken away, in another way of discharging dangerous to Executors; for if it happen that by the Arbitrators, or Award, the Trespassers or Debtors be discharged without full Recompence made, the rest of the value will subject the Executors to the Creditors, because it was their own voluntary act to submit to Arbitrators. (i) Or if an Executor allow a Writ to suffer Judgment to be had against him, upon a Writ which is abatable, he shall not have allowance of that, but this shall be Return'd as a *Devastavit*. (k) Yet where an Action of Debt was brought against an Executor by Original, and he pleaded a Recovery in the Court of I. and that *ultra* he had not Goods of the Testators, which Recovery, was after the *Teste* of the Original: But the Defendant averring, That he had not notice of the Original, it was held a good Plea. But if an Executor be sued on an Obligation, and he pay another Debt after without Suit, having notice of such Suit against him, it is a *Devastavit* in that Executor. (1)

For the Executor of an Obligor paid an usurious Contract or Bond; and it was held a *Devastavit*. (2) And if a Judgment and Execution be awarded against an Executor, the Sheriff may not Return *nulla bona habet Testatoris*; but he is to Return a *Devastavit*. (3) For where the Sheriff cannot levy the Goods in the Defendant-Executors hands, he may Return *Devastavit*. (4) Yea, if money be paid by an Executor upon an usurious Contract, it is a *Devastavit*. And it was held by the Lord Hobard, That if an Executor pay a Bond made upon an usurious Contract, it shall be a *Devastavit* or Waste in the Executor. (l)

3. These and the like Acts are said to be a *Devastavit* or Waste in the Executor or Administrator; which being discovered against him by the Sheriffs Return, will charge him *de bonis Propriis* for so much as he hath so mis-administred; inasmuch, that any Creditor may charge him for the Debt due to him from the Testator, as for his own proper Debt, and for so much Execution shall be made against him upon his own Body, Lands and Goods. Yea the Husband shall be charged in a *Devastavit* for the Waste of himself or his Wife, where she is an Executrix, whilst they both live; but after her death it may be otherwise. And admit the Husband hath

not

It is a *Devastavit* in Executors to pay an Usurious Bond; in Winchestercomb and the Bishop of Winchester's Case. Hob. 167

(g) Offic. Exec. p. 248.

(h) Temp. Eliz. in Cas. int. Hankford & Mitford

(i) Offic. Exec. ubi supra.

(k) Brownl. Rep. part. 2. in Cas. Lawry against Aldred and Edmonds; and as in 10 Ed. 3. 503. 2.

(1) More Case, 877.

(2) Hob. 167. Noy's Rep. in Case Winchomb. vers Pulleston.

(3) Cro. 1. 102.

(4) Yelv. 219.

(l) Brownl. par. 1 Cases in Law

(5) Mich. 13 Jac. not any *Assets*, yet he shall be charg'd of his own proper Goods for the *Devastavit* of his Wife before for *Coverture*. (5) Yea, and B. R. Lumley if a void Administration happen to be committed, and the Administrator waste the Goods, and then Administration be committed to another: In this Case the former Administrator may be charged by the Creditors for the waste done in his time. But if an Executor pay a Debt due upon a present Obligation, it is no *Devastavit*, though there be at the same time a Statute or Recognizance broken for *non* performance of Covenants, (6)

(6) More. Cafe 980. Phyne verf. Bagshaw.

(7) Per Hobard. Justice in Winchcomb and the Bishop of Winchester and Palles-ton's Cafe. Hob. 167.

If one be bound in an Obligation which is usurious, the Bond is void betwixt the parties: And therefore if such an Obligor make his Executors, and dieth, and his Executors pay such usurious Bond, the other Creditors may shew this matter, and make a *Devastavit* of it. (7)

(m) Dyer 185. Co. 5. 32. Old. B. of Entries 11. & Dyer 210 Dr. & Stu. 78 and so held in 12 H. 7. and in Cafe inter Walter and Sutton, in Com. Pl. Temp. El. and in Caf. int. Hankford and Metford. Temp. El. & lib. Entries, fol. 127. Kelw. Rep. fol. 23. & 11 H. 6. 38. a. 4. El. Dy. 210. a. The Writ so issued against the Walter only P. 4. H. 8. Rot. 303. Tr. 34. El. & Pasc. 36. Eliz. Offic. Ex. p. 252. (n) Brownl. Rep. 1 part. 24. 33. 116. 2 part. 81. Vid 4. Eliz. Dyer 210.

4. But for an Executor or Administrator, without fraud, to sell the Goods of the deceased under value, especially where more cannot conveniently be made of them, is no waste. Nor shall one Executor or Administrator be charged for the waste done by another; for where there are many joynt-Executors, if only one of them doth commit the Waste, he alone shall suffer for it. (m) So the Executor or Administrator committing waste in the Gift or Sale of any of the Goods of the Defunct, shall answer it alone, and not he to whom the Goods are so given or sold; yet the Executor or Administrator of such an Executor or Administrator, shall not be question'd for it after his death. Also an Executor or Administrator may lawfully sell or convert the deceased's Goods to his own use, so as he convert the money thereof to the deceased's use in payment of Debts, or the like, and pay so much of his own money as the Goods so converted to his use are worth, and this shall not be imputed to him as a Waste. Yea, he may sell any special Legacy that is bequeathed, and even this shall be no Waste in him, though it be a wrong to the Legatee, in case there be Assets to pay Debts besides: But when he hath enough to pay all the Debts and Legacies, then he may dispose of the whole Estate how he please, without any prejudice to himself or others. (n) And note, That the wasting Executor doth not incur damage, or make his own Goods liable for satisfaction for the Waste, further than the value of the Testator's Goods so wasted or mis-administered doth amount unto. An Action of Debt was brought against two Executors; one appeared and confessed the Action, the other made default; and Judgment was given to recover *de bonis Testatoris* in both their hands; whereupon a *Scire Facias* issued: The Sheriff returned *Nihil*, but he who made default had wasted the Goods, upon which a *Scire Feci* issued against him who had wasted the Goods, and upon Return of the *Scire Feci*, Execution was

was awarded, of his own proper Goods only, without his Co-executors. Also the assent to a Legacy only of one where there be more Executor is good, albeit there be not enough besides to pay the Debt, over and above the Legacies given away by assent; and yet this assent of his shall not prejudice the other Co-executors in a *Devastavit*. (1)

5. If the Executor confess he hath Assets, supposing the Executor to be Defendant, then may the Sheriff Return a *Devastavit*.

(6) If the cause of Action be against Executors or Administrators the Judgment is to recover the Debt and Damages of the Testators Goods, if the Executor hath so much in his hands; and if he hath not, then the Damages (as was formerly shewn) of the Executors or Administrators own Goods. And if the Sheriff upon *Scire Facias* Return a *Devastavit*, then a *Fieri Facias* or *Elegit* may be sued out to levy the Debt and Damages of the Executors or Administrators proper Goods. And if the Executor plead, That he never was Executor nor Administred as Executor, and it be found against him, that he had Administred but one penny, the Judgment shall be given to recover the Debt and Damages of the Executors own Goods. And in a Case of Debt brought upon a Record, the Execution shall be brought where the Record remains. (p)

6. Judgment was given against B. in a Debt of One hundred pound in C. B. After the said Judgment he entred into a Statute to *J. S.* and died Intestate; his Wife takes Letters of Administration, and removes the Record of the said Debt recovered against her Husband into B. R. by Error; depending the Sute, she pays the Debt due upon the Statute to *J. S.* Afterwards the former Judgment is affirmed. On a *Scire Facias* against the Administratrix to have Execution, she pleaded payment of the said Statute, beyond which she had not Assets. Upon this the Justices of the King's Bench were divided, viz. Popham and Gaudy against Fenner and Telverton. It was referred to the Opinion of the other Justices; they joyned in Opinion with Fenner and Telverton, and judged it a good Plea, and that the paying of the Statute was no *Devastavit*; for at the time of the Execution of the Statute she could not plead the Judgment of C. B. it being then doubtful, whether it would be affirmed or not; therefore no default in the Wife-Administratrix in paying and discharging the Statute; for she could not have an *Audita Querela*, nor any other Remedy to be freed from payment of the Statute, at the time of the Execution thereof.

If Executors upon the receipt of the principal money and interest, discharge a penal Bond, the money they receive shall be *Assets*, and the discharge of the Bond without receipt of the penal residue shall be no *Devastavit*. (2)

(1) Dyer 210. Co. 4. 31. Addit. on Dod. 4.

(6) Brownl. Rep. part 2 in Cas Morgan. vers. Sock. Pasch. 12 Jac

(p) Brownl. Rep. in Cas. Green vers. Wilcox, Trin. 44 Eliz.

45 Eliz. B. R. Read & Bearlock's Case. Yelv.

(2) Cro. 3. 490. 603. King vers. The Hilton.

(3) Mich. 40 Eliz.
C. B. Eveling &
Leveson's Case.
Goldsb. 115.

The Queen was indebted to *A.* in 100 *l.* for Goods delivered into the Tower: For which money *A.* took a Debenture from the Queen in the name of *J. S.* and afterwards made *B.* his Executor, and died. *B.* procured *S. J.* to release and surrender the former Debenture to the Queen, and took a new Debenture from the Queen for the said hundred pound to himself. It was held, That this was no *Devastavit* in the hands of *B.* the Executor: But it had been otherwise, if the first Debenture had been taken in *A.* his own name; for then it had been a *Devastavit* by the Executor. (3)

If a woman, Administratrix to her Husband deceased, doth waste his Goods, and take another to Husband, it is a *Devastavit* in him and her: For in a Case of Debt against Husband and Wife, Administratrix of her former Husband, where Judgment was against them: And upon a *Fieri Facias* the Sheriff Returned *Nulla bona*; whereupon another *Fieri Facias* was Awarded against them, with a Clause in the Writ, That if it be found, that the Husband and Wife *Devastaverunt bona, tunc fieri faciat, &c.* The Sheriff Returned, That they had not in their hands any Goods of the Intestates; but that the Wife, being Administratrix to her first Husband, had Goods of the Intestates and had wasted them: And whether they had wasted them according to the Writ, the Jury referred it to the Court. The Court held, That it was a *Devastavit*, and that the Return of the Sheriff was good enough. It was adjudged for the Plaintiff. (4)

(4) Trin. 16. Car.
B. R. King &
Hilton's Case.
Cro. 1. par. 438.
(5) Hob. 266

If one that is Executor for a certain time only, commit a *Devastavit*, or waste the Testators Goods; *Q.* what remedy or relief for the Creditor after the time is expired.

If there be two several Recoveries of Debts against Executors, the first Recovery must be first paid, and have the first Execution: For if the Executors do pay the last Recoverer before they have the first, there not being Assets to satisfy both, a *Devastavit* shall be Returned against them, and they shall be charged to pay the said Debt with their own proper Goods. (6)

(6) 7 H. 7. per
Vavisor Justice.

W. brought Debt against *R.* as Executor, and had Judgment *de bonis Testatoris*, and a *Fieri Fac.* was awarded, the Sheriff Returns *Nulla bona*, upon which the Plaintiff surmises, That the Defendant had wasted the Goods, and prays a *Scire Fac.* against him, to shew cause why he should not have Execution *de bonis Propriis*; and it was awarded, that he should have no such Execution, until the Sheriff did Return a *Devastavit*. Yet in 9. H. 7. Executors 9. An Executor pleads *plene Administravit*, which is found against him, and there a special *Fieri Fac.* of the goods of the deceased; and if it can appear, That they are wasted, then *de bonis Propriis*, and so it was adjudged. But there was found by the verdict, that he had Assets, but here it doth not appear if he

had

had *Assets* or not; so there is a diversity between the Cases. Also Case Williams by the *Devastavit* the Judgment shall be altered (that Execution against Roberts shall be *de bonis propriis*) which cannot be without a Return of Noy the Sheriff.

Gaudy Justice held, That in an Action of Debt against an Executor, it was no Plea for him to plead, a Statute-staple made by his Testator in his life-time, above which he hath nothing: His Reason was, For that if the Testator were bound in a Statute to perform Covenants, which are not yet broken, and possibly will never be broken, and yet should never therefore be compell'd to pay Debts, it would be a great inconvenience: And yet on the other part, he said it would be a greater mischief; for that if after the Executors payment of the Debt, the Statute should be broken, he would be chargeable by a *Devastavit* of his own proper Goods, the which would be a greater inconvenience. (1)

(1) Hill. 43 Eli.
C. B. Woodcock
& Hern's Case
Godbs. 142

Although a woman, who in Executrix to her Husband, marry with his Debtor, yet if she out-live him, it will be no *Devastavit* in her, for she may then have her Action against his Executor, as in *Croftman* and *Read's* Case which was this, *J. S.* made his Wife his Executrix, and died: *J. D.* being then indebted to the Testator in 100*l.* upon a simple Contract, the Wife-Executrix took to Husband the said Debtor *J. D.* who made his Executor, and died. Whereupon *A.* Creditor of *J. S.* brought an Action of Debt against the Wife-Executrix of *J. S.* And upon the pleading, the Question was, If by the intermarriage of the Wife with her Testators Debtor, the same were a *Devastavit* or not? and, If the said 100*l.* should be *Assets* in her hands? It was the Opinion of the whole Court, That it was no *Devastavit* nor *Assets*; for the Woman may have an Action against the Executor of *J. D.* (2)

If a man possessed of a Term of years, devise it to another and the Devisors Executor or Administrator, before his assent to the Devise, doth commit Waste on the Land in Lease: In this Case he may be charged with, and sued for this Waste by him in Reversion: But if the Executor die, his Executor shall not be charged therewith; for it is a personal wrong that dieth with the person. (3)

(2) Mich. 31 Eliz
B. R. Croftman &
Read's Case.
Leon. 320.

On the Covenant of a Testator, upon a Lease for years, made for the quiet enjoyment of the Land leased, an Action of Covenant was brought against an Executor for a disturbance after the Testators death, who gave divers Legacies by his Will, which the Executor paid before any Covenant broken. The Question was, Whether the Executors ought to have forborn the payment of the Legacies till the end of the Term, or till the Covenant was broken? and for doing otherwise, Whether he were to be charged, *de bonis*

(3) Co. 5. 12. 8.
8. 94.

(4) Styles Rep.
37. 54. 73.

bonis Propriis, as for a *Devastavit*? or, Whether he had done well in what he had done, by paying the Legacies before, &c. The Case was not adjudged; but it was agreed, That had the Covenant been broken before the Legacies were paid it had been a *Devastavit* in the Executor. (4)

(5) Hob. 266.
(6) Mich. 27 Eliz.
C. B. Rutley's
Case. Godbolt 29

A new or later Executor may have an Action against a former Executor, for a *Devastavit* or wasting the Testators Goods by a fraudulent or undervaluing sale thereof by Covin, but not against the Vendee. (5)

A Release made by Executors after they come of full age, to an Administrator *durante minori etate*, may be a *Devastavit* of the Goods of the Testator; and a *Devastavit* may be of Goods, though they be not Goods in possession. (6)

C H A P. XXVII.

Of the Executors Power in Sale of Lands devised to be sold.

1. *The difference between a Devise, that the Executor shall sell the Land, and a Devise of the Land to the Executors to be sold.*
2. *The profits of Land devised to be sold, are not Assets in the Executors hands for a time before such sale.*
3. *In what Case the Heir may, or may not enter upon unsold Lands devised to be sold.*
4. *Executors accepting, may without others refusing, make a good Sale of Lands devised to be sold.*
5. *In what Case surviving Executors cannot sell Lands devised to be sold.*
6. *Cases in Law pertinent to the premises.*

(a) Stat. 21 H. 8.
cap. 5.
(b) Perk. tit. De-
vises, fol. 104,
105.
(c) Ibid. & Bro.
Abridg. tit. Devise
nu. 19.
(d) Kelw. Rep.
fol. 107, 108.
nu. 25.

1. **W**Here Land is by Will appointed to be sold, neither the money raised, nor the profits, shall not be accounted as any of the Testators Goods or Chattels. (a) And when a man deviseth, that his Executors shall sell the Land, there the Land in the mean time descends to the Heir; (b) and until the Sale be made, the Heir may enter and take the profits. (c) But when the Land is Devised to his Executors to be sold, there the Devise raketh away the Descent, and vesteth the State of the Land in the Executors, and they may enter and take the profits, and make sale according to the Devise. (d) Also when a man deviseth his Land to be sold by his Executors, it is all one as if he had devised his Land to his Executors to be sold, because he then likewise deviseth

devise the Land whereby he breaketh the Descent. And if one devise his Lands to his Executors for payment of his Debts, and until they be paid : By this Devise the Executors have but a Chattel, and an uncertain interest, and shall hold it till the Debt be paid, and no longer. (1)

(1) Co. on Lit. 2.

2. If a Testator doth appoint by his Will, his Executors to make sale of certain Lands for the use and behoof of the said Testator, and the Lands after the Testators decease happen to remain some time unsold, the profits thereof in the said time before such sale made shall not be Assets in the Executors hands, unless the Testator did devise, That the mean profits till the sale should be Assets in their hands : for otherwise they shall not be so, though the Executors, in this Case, have no estate or interest in the Land, but only a bare and naked power and authority. (e)

(e) Cok. Inst. lib.

3. But if the Executors having power to sell the Land of the Testator, defer the sale thereof after the offer of a reasonable price, converting the profits thereof to their own use, the Heir may lawfully enter to the Land, and put out the Executors. (f) if

2. cap. 10. Sect.
169. &c. lib. 3. cap.
5. Sect. 383.

they have no further authority or interest than only to sell the Land, and distribute the money ; for then the Frank-tenement doth descend to the Heir, (g) and the Executors are bound to perform the Devise in convenient time : But if the money for the

(f) Dyer fol. 571.

nu. 3. Fulbeck
Paral. lib. 1. fo.

41.
(g) Kelw. ubi
supra.

same be to be distributed *in pios Usus*, then the Frank-tenement is in the Executors, after the death of the Testator, and not in the Heir. (h) So that in such Case he may not enter, as in the former.

(h) Ibid. Kelw.

Yea, if Lands devised to be sold, be not accordingly so done by the Executors, the Law will then enforce them to sell the Lands so soon as they can, because the mean profits, in that Case, taken before sale, are not Assets to charge the Executors as compellable to pay Debts of the same : But if a man devise, that his Executors shall sell his Land, there they may sell it at any time, for that they have but a bare and naked power, and no profit.

4. If many Executors be named in a Will, wherein power is given to them to sell Land for any purpose ; and some of these Executors refuse the Executorship : In this Case, the other Executors who stand to the Will, may dispose and sell the Land, without the consent of the other who so refused the Executorship. (i) But note, That an Executors Executor cannot sell the Land of the first Testator (who by his Will gave power to his Executor to sell the same) unless there be a Co-executor surviving.

(i) St. H. 8. &
Swinb. part. 6.
§. 3. nu. 7.

5. Although the surviving Executor may sell the Land which a Testator doth bequeath to his Executors to be sold, because as the State, so the trust shall survive ; yet in case the Executors in that part of the Will empowering them to sell, be particularly named, each by his particular Name, and one of them

refuse

refuse and die before sale made, then the Survivors cannot sell (k) *Coke Inst. lib. the same, (k)* because the words of the Testator (one of the 2. c. 10. Sect. 169. Executors refusing or being dead) cannot be satisfied, unless the Testator express in his Will a power to the Survivor or Survivors of them, or to such or so many of them as take upon them the Probate of the Will; without which words (the Executors being particularly named) it is otherwise: But if the Land to be sold be left to his Executors generally, not particularizing their names, then sale made by some of them only, in this Case is good; for that now by the Statute of 21 H. 8. cap. 4. it is provided, That where Lands be willed to be sold by Executors, though part of them refuse, yet the residue may sell. But here note, That they may not sell to him that so refused, because he is yet a party, and privy to the Last-Will, and remains an Executor still so long, as any Coexecutor lives. For it was the Opinion of the, &c. Here not unaptly mention may be made of *Howel's Case* against *Barnes*, upon a Suit in *Chancery*: The Case was agreed by the Council of both parties, and refer'd to Justice *Croke, Jones, Berkley*, to consider and certify their Opinions. The Case was, *F. B.* seised of Land in Fee, deviseth it to his Wife for her life, and afterwards orders the same to be sold by his Executors here under named, and the moneys thereof coming to be divided amongst his Nephews. And of the said Will made *W. C.* and *R. C.* his Executors. *W. C.* dies, the Wife is yet alive: Two Questions were made 1. Whether the said *W. C.* and *R. C.* had an interest by this Devise, or but an authority to sell? 2. Whether the surviving Executor hath any authority to sell? They all resolved, That they have not any interest by the Devise, but only an authority. Secondly, That the surviving Executor, notwithstanding the death of his Companion, may sell: And so they certified their opinions But whether they might sell the Reversion immediately, or ought to stay until the death of the Feme, was a doubt. *Vid. 30 H. 8. Br. Devise 31. 9 Ed. 3. 16. Cok. Lit. 112, 113, 136, 181. 8 Aff. 26.*

Mich. 10 Car. in
Chancery. *Howel*
vers. *Barnes*.
Cro. Rep
Tr. 27 H. 8. An-
derf. Rep. Cal. 52.

6. Note, That by the Opinion of the Justices, if a man makes his Last-Will, and Wills that his Executors shall sell his Land, and Devises his Land to his Executors to be sold, and one of the Executors refuse the Administration of the Testators Goods before the Ordinary, the other Executors cannot sell the said Land to the Executor so refusing the Administration, by the Statute of 21 H. 8. cap. 4. For that Executor, notwithstanding such his refusal, is still a party, and privy to the said Testament, and is one of the Executors at his pleasure.

It was adjudged in *B. R.* between *Vincent* and *Lee*, where a man devised, That his Sons in Law should sell the Reversion of his Land, without mentioning their particular names; if some of them die, that the others may sell.

Upon.

Mill. 25 Eliz. Vin-
cent ver. *Lee*.
Mo. Rep. n. 292.

Upon a special Verdict, the Case was : A man seised of Lands in Possession, and of other Lands in Reversion, upon an Estate for life, deviseth by his Will in writing, that his Executors should have all his Lands Free and Customary in D. for Ten years, to perform his Will, and the Will of his Father, with the profits thereof ; and that after the Ten years, his Executors or any of them should sell it for the payment of his Debts. He makes three Executors and dies : The one dies, the Ten years expire, Tenant for Life dies : The two surviving Executors sell the Land, &c. *Spurling*. This sale is not good : 1. The Reversion of the Estate for Life passed not, because he had other Lands there to satisfy the words ; and it was not his intent to pass it because there were not any profits to be taken thereby. 2. The sale by the two surviving Executors is not good, for it ought to have been by all, or by one of them only. But the Court resolved to the contrary in both ; wherefore it was adjudged accordingly.

The same Case is reported by *Anderson*, thus ; viz. *J. T.* brought *Ejectione Firmæ* against *J. W.* and others. The Defendants pleaded *Non culp.* whereupon special Verdict was given, the which in effect was, that one *Smith* being seised of twenty Acres of Land, made a Lease thereof to one for Life, and being also seised of sixty other Acres, made his Will in manner following ; viz. *I will and charge my Executors, and every of them, to fulfil my Fathers Will, and this my Last-Will,* (in which were divers Legacies :) *In consideration whereof I give all my Lands and Tenements to my Executors, and they to take the profits thereof by the space of Ten years ; and these Ten years ended I will the same to be sold by my said Executors, or by one of them.* And made three Executors and died ; after the Tenant for life died, one of the Executors died also. The two Executors enter on the sixty Acres, and receive the Profits thereof for Ten years, but entered not on the twenty Acres ; but after the Ten years ended, the surviving Executors sold the twenty Acres to *J. H.* who entered, and leased the same, whereon the Action is brought. It was said, That the Executors did not sell ; but it was adjudged, that the surviving Executors might sell : For it appeared, that the intention of the Testator was, That the Land should be sold for the performance of his Will, which the surviving Executors might execute, and consequently do what the Testator appointed in order thereunto.

B. brought Trespass against C. and upon the General Issue, this matter was found : T. was seized of a Mannor, whereof the place where &c. was parcel in his Demesne as of Fee, and by his Will

Tr. or Hill. 35. El.
Mich. 28 &
29 Eliz. C. B.
Townsend ver.
Wale. Cro. Rep.
par. 3. Pl. 54.

Hill. 35 Eliz.
Townsend &
Wale's Case. An-
ders. Rep. par. 2.
Caf. 44.

Pasch. 29 Eliz.
B. R. Bonefant
and Sir R. Green-
field's Case 78.
Will Leon. Rep.

Will devised the same to his four Executors; and further Willed, That his said Executors should sell the same to S. for the payment of his Debts, if the said S. would pay for it 100 l. at such a day, and died. S. did not pay the money at the day. One of the Executors refused Administration of the Will: The other three entered into the Land, and sold it to the Defendant for so much as it could be sold, and in convenient time. It was moved That the Sale was not good; for they have not their authority as Executors: but as Devisees, and then when one refuseth, the other cannot sell, by 21 H. 3. *Cestui que use*, Wills, That his Executors shall Alien his Land, and dieth; although the Executors refuse the Administration, yet they may alien the Land, 19 H. 8. 11. 15 H. 7. 12. Egerton Solicitor argued, That the Sale is good by the Common Law, and also by the Stat. 49 Ed. 3. 16, 17. devise, that his Executors shall sell his Land, and dieth, and one of the Executors dieth, another refuseth, the third may sell well enough, and such sale is good. See Br. Devise 31. 3 H. 8. 30 Ed. 3. Br. Affize 356. And he put a difference where an Authority is given to many by one Deed, there all ought to joyn; contrary, where the authority is given by Will: And if all the Executors severally sell the Lands to several persons, such Sale which is most beneficial for the Testators shall stand and take effect: And here it is found by Verdict, That one of the Executors *Recusavit onus Testamenti*, ergo, he refused to take by the Devise, for it was devised unto him, to the intent to sell; therefore if he refuseth to sell, he doth refuse to take, and so it is not necessary that he who refuseth, joyn in the sale: And although we are not within the express words of the Statute, yet we are within the sense and meaning of it. And afterwards it was adjudged, That the Condition, for the manner of it, was good.

C H A P. XXVIII.

Of Debts, Legacies, and Mortuaries, and the Executors method in the Payment thereof.

1. *Debts to be paid before Legacies ; so also are Covenants broken*
2. *The Executor may pay himself first, how to be understood.*
3. *What Debts to the Crown, shall have priority of payment before Debts to the Subject.*
4. *Judgments upon Record, to be satisfied next after the Debts due to the Crown.*
5. *Next after Judgments upon Record, Debts by Statutes or Recognizances, are payable before meer personal Debts.*
6. *After Statutes and Recognizances, Debts due by Obligations or penal or single Bills, are to have the next precedency in payment.*
7. *Debts upon Specialties, Bonds and Bills, are to be satisfied before Debts upon a simple Contract.*
8. *After Obligations, Debts due upon simple Bills, Merchants Book, and other Specialties are to be paid.*
9. *Touching Debts due for Rents upon Leases, what the Law in that Case is.*
10. *Debts for Servants wages payable before Legacies*
11. *Covin in an Executors payment shall not prejudice a Creditor.*
12. *Mortuary, what it is ; when, where, how much and in what cases payable.*
13. *Law-Cases relating to this Subject.*

1. **A**LL the Debts must be paid, before any Legacies be paid or delivered, and if there be not enough (over and above the Legacies) to pay all the Debts, then and in that Case any thing given by way of Legacy, may be sold for payment of the Debts ; and in such Case the Legataries must be content to lose their Legacies. But the payment of Legacies in *specie* by an Executor, who hath not Assets left to make satisfaction for a Covenant made by his Testator and broken afterwards, is no *Devastavit* : Otherwise, if the Covenants be broken when the Legacies were paid. (1) For Covenants are to be accounted of as Debts. (2) In such Case therefore, Legacies ought to be paid conditionally ; *viz.* To be restored, if the Covenant should be broken. It was *Necton and Sharp's Case*, 38 *Eliz.* 3.

(1) Per Hales for the Defendant in *Eccles and Lambert's Case*.
 (2) Dr. & Stu. 2. c. 10. Dyer f. 324. Hob. f. 363, 397.
 (3) Per Rolls in dict. *Cal. Eccles.*

(a) Plowd. in
Caf. inter Wood-
ward and Darcy.
(b) Co. Rep. lib.
15. fol. 30.

(c) L. Scimus. §.
in computatione.
Cod. de jure De-
liber. & C. Stat.
§. Statuimus de
Test. lib. 3. Prov.
Const. Cant.

* Hill. 12 Jac. B.
R. Ifack and Clark.
Intratur Trin. 11
Jac. B. R. Rot
1100. Rol. Rep.
(d) Magn. Chart.
c. 18.

(e) M. 33 & 34
Eliz. The Lady
Walsingham's
Case.

(f) Offic. Exec.
cap. 12. p. 206,
&c.
7 E. 6. Dyer. 80.
30 E. 4. 21

2. In the first place, the Executor or the Administrator, if he be a Creditor to the deceased, shall be preferred before others; so that he may deduct to satisfy himself first, although other Creditors lose their whole debt thereby, specially if his debt be in equal degree with the other debts, so that an Executor may allow his own debt in prejudice of other like Creditors, (a) if he hath made an Inventory, and in case he be not Executor of his own wrong. (b) Understand this especially, when the debts are of equal degree; for if the Testator be indebted to other men by Statute, Judgment or Recognizance, and to the Executor only by Bond or Specialty, then may he not first pay himself, unless there be Goods sufficient to pay both him and them. But by the Civil and Ecclesiastical Laws the Executor is in the same case with other like Creditors. (c) Also if an Executor doth with his own proper moneys pay the debts of his Testator, the Goods of such Testator are by the Common Law chang'd as for so much, and become the Goods of the Executor, for *per Bract. Pretium succedit in loco rei.* *

3. If there be any Debt due to the Crown, and the King Commence his Suit for it before any other man can get a Judgment for his Debt, he shall be satisfied before any others; neither is it in the election of the Executor to prefer any other Debt due to any Subject. (d) So that if the Executor be sued by any Subject for any such Debt, he may plead in bar of the Suit, That his Testator died thus much in Debt to the King, shewing how, &c. and that he hath not Goods surmounting the value of that Debt. (e) And if the Suit be not so by way of Action, as that the Executor hath a day in Court to plead, but be by way of suing Execution as upon Stat. Merchant of Staple, then is the Executor put to his *Andita Querela*, wherein he must set forth this matter: But this priority of payment of the Kings Debt before any other, is to be understood of such of the Kings Debts only as are of Record, and not of sums of money due to the King upon Wood-sales, or sales of his Minerals, for which no Specialty is given, or of Amercements in his Courts Baron, or Courts of his Honours, which be not Courts of Record, or of Fines for Copy-hold Estates there, or of money upon the sale of Strays within the Kings Manors or Liberties, or of Forfeitures to the Crown of Debts by Contract, due to any Subject, by Out-lawry or Attainder, until Office thereupon found. (f) But of Fines and Amercements in the Kings Courts of Record, there is no question but they are Debts of Record. Also Executors ought to pay Debts upon Judgments, before Debts upon Specialties.

4. When the King is satisfied, then must the Debts of the Subject be paid, (g) if there be Goods of the deceased sufficient remaining, and that in this order or method: First, before the other personal Debts, whether they be due by Obligation, Bill, or otherwise, Judgments and Condemnations are to be discharged; that is, the Debts due by Record, by any Judgment had against the deceased in any Judicial Proceeding in any Court of Record. (h) Nor is it any Plea for a Creditor by Statute to say, that his Statute was acknowledged before the Judgment, and so is more ancient; for a Judgment, though latter, yet being more puiſne, is to be preferred before a Statute in time precedent: But if this Judgment be satisfied, and is only kept on foot to wrong other Creditors, or if there be any Defeazance of the Judgment yet in force, then the Judgment will not avail to keep off other Creditors from their Debts. (i) And here note, that between one Judgment and another had against the Testator, precedency or priority of time is not material, but he that first sueth Execution shall be preferred, and before any Execution sued, it is at the election of the Executor to satisfy which Judgment he will first. (k) And here observe further, that this is to be understood of Judgments only against the Testator, and not of any against the Executor himself; also, that what is said of a Testator, in case of an Executor immediate, is to be understood likewise of the Testator's Testator in case of the Executor of an Executor. Again, the foresaid respect to Debt by Judgment, is not to be restrained or limited, only to the Four Courts at *Westminster*, but extends it self to Judgment in all other Courts of Record, as in Cities and Towns Corporate, having Power by Charter or Prescription to hold Plea of Debt above Forty shillings; for though Execution cannot be there had of any other Goods than such as are within the Jurisdiction of that Court; yet if the Record be removed into Chancery by a *Certiorari*, and thence by *Mittimus* into one of the Benches, then Execution may be had upon any Goods in any County of *England*. Notwithstanding the premises, it is held, That the payment of a Debt upon Execution upon a Statute, by an Administrator, before a Debt due upon a Judgment, is no *Devastavit*. (l)

Again, Debts upon Specialties must be paid before Debts upon Contract, (i) and Debts upon Record must be paid before Debts upon Specialties. To which purpose is that Case reported, wherein it was held, That the Debt of a man condemn'd in Debt, and dying before Execution, it being a Debt upon Record, was to be paid before Debts upon Specialties: And that if the Executors be sued upon the Obligation, they may plead a Recovery against them, which is not executed; which if they do not do, but Judgment is given, and Execution pass against them before

(g) Co. 9. 88.
 Plow. 184. 545.
 Dyer. 80. Dr. &
 Stu. 75. to 79. 132.
 33 H. 8. 39. Co.
 5. 28. 454, 59, 60.
 8. 132. Dyer 232.
 32. 21 E. 4. 21. &
 Bro. Exec. 85. 172.
 Co. 8. 132. Dyer
 32. Plow. 279, 280.
 Bro. Exec. 103.
 Kelw. 74. Brow.
 Rep. part. 1. 73.
 53. 76. 77. 82.
 104. 103. 2 part.
 53. 82. 37.
 (h) Bro. Exec.
 nu. 172. Dr. &
 Str. lib. 2. cap.
 10. D. Coke lib.
 4. fol. 60.
 (i) Co. l. 5. fol.
 28 & l. 8. f. 132
 (k) 15. & 16 Eliz.

(l) Yelv. 29.

(i) 29 H. 8. Dyer
 32.

(2) 6 Eliz. Dy. 8.
vid. Co. 5 part.
Harrison's Case.

(3) Mic. 32. Eliz.
C. B. Pemberton
& Barham's Case
& 43 Eliz. B.R.
Bearblock &
Read's Case.

Vouched in Co.
4 par. in the
Case of the War-
den and Commor-
nalty of Sadlers.
(4) Co. 5 part.
Harrison's Case.
(m) Mic. 32. Eliz.
in C. B. Pember-
ton and Barham's
Case, & Co. 4
part. The Case of
the Warden and
Commonalty of
Sadlers.

(n) Coke 5. 21.
Seamain's Case.
Execution against
an Executor upon
a Statute; & 1.
eos Cod. Qui po-
nitores in pignore
(o) An. 13 Ed. 1.

the first Judgment be executed, it is a *Devastavit*, and they shall answer *de bonis Propriis*. (2) Yea, the Executors of a deceased ought not only to pay a Debt upon a Recovery against their Testator in his life-time, before any Debts upon Specialties; but they must also (if there be Assets) pay such Debt upon Recovery, before a Recognizance, or Statute Merchant, or Staple, albeit also that the Recovery be subsequent in time unto the other: And therefore the Case is, If a man be obliged in a Recognizance, or a Statute-Merchant, or Staple, and afterwards a Recovery is had against him in an Action of Debt, and he make his Executors and die, his Executors are bound by Law to pay the Debt upon the Recovery, though it be a later Debt, before the Debt due by Recognizance or Statute; because although they are both Records, yet the Judgment in the Kings Court, upon Judicial Proceeding, is the most notorious, and the more eminent in degree, than a Statute or Recognizance taken in private by consent of the parties, and therefore shall be preferred before it. (3) Also a Judgment in a Court of Record shall be paid before Statutes, which are but private Records, as also before Recognizances acknowledged by assent of the parties. (4) Likewise a Debt upon or after a Recovery, though it be a later Debt, shall be paid before a precedent Debt due by Recognizance or Statute; because although they are both Records, yet the Judgment in the Kings Court, upon Judicial Proceeding, is the most notorious and more eminent in degree than a Statute or Recognizance taken in private by consent of the parties, and therefore shall be preferred before it as aforesaid. (m)

5. In the next place, Debts due by Statutes or Recognizances entred into by the deceased are to be satisfied; for the debt due upon Statute-Merchant and Recognizance is to be discharged (if there be Assets) before any personal Debt; (n) for that by virtue of the Recognizance, not only the person of the Debtor is obliged, but also after the expiration of the day of payment, the moveable Goods of the Debtor may be apprehended, and sold for satisfaction of the Debt. (o) Here note, that a Statute and Recognizance standing in equal degree, it is at the Executors election to give precedency to which he will; neither is it material which of them was first or last, nor between one Statute and another doth the time or antiquity give any advantage as touching the Goods, though touching the Lands of the Conusor it doth; but as for his Goods in the hands of the Executor, he who first seizeth them by his Execution, shall have preferment; and before suing of Execution, the Executor may give precedency to whom he will, and may, if he please, satisfy the Recognizance before the Statute, at least, if he do it before Execution sued thereupon: But Executors (under pretence or colour of Recognizances for the

Peace or Good-behaviour, or the like, or under pretence of Statutes for performing Covenants touching the enjoying of Lands, not forfeited, nor any sums of money possibly ever thereupon becoming payable) are not to withhold payment of Debts by Specialty, and thereby defraud the Creditors; so that if the Statute or Recognizance be only for performance of Covenants, and no Covenant be broken, an Obligation for the payment of present money shall be discharged before it; Also no Judgment or Statute that is discharged, or is left and suffered to lie by Agreement to bar others of their Debts, shall bar Debts upon Obligations. And here note, That a Statute is a more expedite remedy than a Recognizance; for upon a Statute, Execution may be taken out without any *Scire Facias*, or other Suit, which cannot be in the Case of a Recognizance; for there if a year be pass'd after the acknowledgment, no Execution can be sued out against the party, himself acknowledging it, without a *Scire Facias* first sued out against him; and if he be dead, then though the year be not pass'd, yet must a *Scire Facias* be sued.

6. After Statutes and Recognizances, Debts due by Obligations and penal and single Bills are to be paid, if there be yet Assets. (p) And if there be divers Obligations, then it seemeth to be in the power of the Executor to discharge which he will first, (q) unless the day of payment in the one Obligation be expired, and in the other not yet come; in which Case the Obligation, whereof the day of payment is expired, is to be first satisfied: (r) Or unless a Suit be commenced for one of the Obligations; for then it is not in the Executors power, in prejudice of that Suit, to discharge an Obligation, for which no Action is brought. (s) But if two several Creditors bring several Actions against the Executor upon two Obligations, he that first getteth Judgment must first be satisfied. (t) Yet a Debt due upon Record may be paid depending the Action; (u) and although in case of several Obligations, when the time of payment upon the one, was come at the time of the Testators death, not so upon the other; and he to whom the Obligation is, whose time of payment was expired at the Testators Death, forbear to demand or sue for his Debt, until the other Obligation become also payable: In this Case it is then in the Executors power to pay which he please, if the Goods extend not to pay both; for it is the Commencement of the Suit only which intitles to priority of payment, or at least restrains the Executors election; therefore an Executor may not pay a Debt of equal degree to a Creditor that brings no Action for the same after another Creditor hath brought his Action. (w) But whether a bare verbal demand, without a Suit, be sufficient to hinder the Executors payment to the other, is a Question, but resolved in the Negative

(x) Offic. Exec. p. 222, 223 & Dr. & Stud. p. 78. (x) Yet an Executor may make payment of any Debt due by Record, as by Judgment, Statute, &c. after Suit begun by another for some other Debt. And notwithstanding what hath been said, an Executor cannot in all Cases pay him first who first commenced Suit, but he who first hath Judgment, must first be satisfied; as, when one Creditor doth first begin Suit, and others suing after him, get Judgment before him. (y) And in such Cases the Executor may expedite the Suit of the one, by a quick confession of his Action; and retard the Suit of the other by *Essoigns*, *Empancances*, or dilatory Pleas. (z) Nay, after Suit commenced, yet until the Executor hath notice thereof, he may pay any other Creditor, and then plead, that he hath fully Administred before notice of the other Suit.

(y) 41 E. 3. Fitz. Exec. 63. 6, & 7 Eliz. Dy. 232. vid. 21 H. 7. Kelw. 74. (z) 5 H. 7. 27. So. Walmisley Just. p. 39 Eliz. Co. lib. Intr. 269. Such a Recovery by confession is pleaded against another, and held good; Dr. & Stud. p. 78. b. (*) 7 H. 4. 10. Plow. Com. 277. (t) 2 H. 4. 21.

(a) Dr. & Stud. lib. 2. c. 10.
(b) Dr. & Stud. ibid.

7. For it is a good Plea for the Executor to say, That he had fully Administred before he had notice of the Plaintiffs Writ; * for though he do pay Debts upon Contracts, the Writ depending against him upon a Bond, whereas he had no notice of the Suit, he shall not be in such Case charged. (†) Yet regularly in this case of an Action brought upon a simple Contract, the Executor is to plead and set forth those Debts upon Specialties; yet Debts upon a simple Contract are to be paid before Debts of Charity. (a) Likewise Debts upon a simple Contract are to be paid before amends for a Trespass done by the Testator. (b) And here note, that between a Debt by Obligation, and a Debt for Damages upon a Covenant broken, there is not any priority or precedency, but the Executor, may pay which he please first. But if one hath a Debt due to him from the deceased upon a simple Contract, or the like, and he sue the Executor for it, when there be Debts due to others upon Bonds and Bills unsatisfied: In this Case, the Executor may not pay this Debt, nor may he suffer the Plaintiff to recover in his Action, unless he hath Assets sufficient to satisfy the Bonds and Bills over and above that of the simple Contract. For Debt was brought against an Executor, who pleaded, *Fully Administred*, and gave in Evidence, That he had paid divers Debts upon Contracts made by the Testator, whereas the Plaintiff's Suit was upon an Obligation. The Plaintiff demurred upon the Plea, and had Judgment, because Debts upon Specialties must be paid before Debts upon Contract: But the Judgment was only *de bonis Testatoris*. (†) Yet an Obligation made by a Testator in his life-time, and becoming due after his death, is to be satisfied before a Decree in *Chancery* against an Executor for money. (2)

(†) 29 H. 8. Dyer. 32.

(2) Per. Roll. Sryles Rep. 28.
(e) Dr. & Stud. ibid.

8. After Obligations, Debts due upon simple Bills, or Merchants Books, or other Specialties, are to be satisfied and discharged, (e) though indeed Bills are of the nature of an Obligation, and charge the Executor as well as an Obligation; for whatever words prove a

man

man to be a Debtor, or to have another mans money in his hands, or wherein the Testator, if he were alive, could not wage his Law, shall charge the Executor. *(d)* And under this Head may be placed Debts due upon Shop-Books, and some verbal Contracts and Covenants Parol. (d) Fullb. Paral. lib. 2. fol. 30.

9. Now Debts due for Rent upon Leases of Land, or Grant of Rent will come into consideration; though some are of opinion, that Debts due for Rent in the Testators life-time (be the Rent reserved upon Leases made by or without Deed, for years, or at will) are in equality of degree with Debts due upon Specialties; if the Rent grew due since the Testator's death, then it is not in Law accounted the Testators Debt; for only so much is in Law accounted Assets to the Executor, as the profits of the Leases amounted to over and above the Rent; so as for that Rent so behind, the Executor himself stands Debtor, and therefore is suable in the *Debet* and *Detinet*, whereas for the Rent behind in the Testators life-time, and all other the Debts of his Testator, he must be sued in the *Detinet* only. For this reason it is, That an Executor sued for debt upon Bond or Bills, cannot (except in some special Cases) plead a payment or recovery of Rent grown due since the Testators death, though of Rent behind at the time of his death it be otherwise.

10. If the Creditor hath no Specialty or Writing, the Executor is not bound precisely to pay the pretended Debt, saving for the Servants wages; *(e)* for where-ever the Testator might wage his Law, no Action lieth against his Executor. *(f)* But Debts due for Servants wages, and Workmen also must be paid. For Assumptions or Promises made by the Testator upon good consideration, will oblige his Executors to a performance or recompence, in case of non performance; but these are post-posit, and give place to all the former; and an Action of the Case may be brought against the Executor, upon the Promise or Assumption made by the Testator in his life time by word only, without writing, if there be Assets. *(g)* And these Debts by Contract or Assumption express are to be satisfied before Legacies; *(h)* and also before the reasonable part to the Wife and Children, to which by custom in some Counties they are intitled. *(i)* And if the Action be brought upon Assumpsit of the Testator, Judgment will be of the Goods of the Testator; but if upon the promise of the Executor, then of his own Goods. *(3)* The like we have in another Case, wherein it was said by the Court, That where an Executor or Administrator is charged upon his own promise, Judgment shall be given *de bonis Propriis*; for his promise is his own act. *(4)* And as no Action may be brought against an Executor upon an *Assumpsit* made by his Testator; so on the other side, an Action may be brought by (e) Bro. Exec. nu. 87. & nu. 163.
(f) Terms of Law, verb. Exec.
(g) Bro Exec. nu. 172.
(h) Co. lib. 9. fol. 88. & Dr. & Stud. lib. 2. cap. 10, 11.
(i) 21 Ed. 4. 21. & 2 E. 4. 13. & 2 H. 6 16.
(3) Hill. 30 Eliz. B. R. Howel & Trevanian's Case. Leon. Rep.
(4) Mich. 32 & 33 Eliz. in the Exchequer. Case Fillocks vers. 221 Hobs. Leon.

an Executor upon an *Assumpsit* or Promise made to his Testator, as in the Case of *Edwards* against *Stapleton*, where an Action upon the Case was brought by an Executor upon a Promise made to the Testator, and the Executor in the end of the Plea omits this Clause, *Et Profert hic in Cur. Literas Testament.* And that was assign'd to be erroneous: And for that it was pray'd to be reversed in a Writ of Error. Which the Court did accordingly: So the Judgment was reversed. (5)

(c) Mich. 38 &
39 Eliz. Rot. 407.
Nov. Rep.

11. If there be two Creditors in equal degree, and both sue, if the Executor doth by *Covin* or Agreement help that Creditor that begun his Suit last, to his Judgment or Execution first, and there be not Assets then left to pay the other Creditor, he must be satisfied out of the Executors own Estate, if this *Covin* be proved against him; for an Executor ought not to help one Creditor to a Judgment sooner than another *Coviously*. But the confession of an Action so done on purpose by an Executor, is no *Covin* in the Law; for *Covin* is where the Action is untrue, and not where the Executors bear a lawful favour. (k) But where there is really *Covin* in an Executor, there it shall be no prejudice to a Creditor; and for this reason it is also, that an Acquittance given to an Executor for more than he paid, shall not prejudice a Creditor for more than the Executor did really pay.

(k) Dr. & Stud.
ibid.

12. A Mortuary or Corse-present is a Gift left by a man at his death to his Parish Church, for the recompence of his personal Tythes and Offerings, not duly paid in his life-time; and this by the Executor was used to be paid, next to the Heriot, and before the Debts. (l) And if a man be sued in the Spiritual Court for a Mortuary, a Prohibition will lie. (m) Though it appeareth by the Statute of 13 Ed. 1. commonly called *Circumspesse agatis*, That Mortuaries are suable in the Court Christian; and in the Statute of 21 H. 8. cap. 6. an Order and Rate in money is prescribed for Mortuaries. And in ancient times, if a man died possessed of three or more Cattel of any kind, the best being kept for the Lord of the Fee, as a Heriot; the second was wont to be given to the Parson in right of the Church. (n) But more particularly touching Mortuaries, these five things are more especially observable from the said Statute: 1. That no Mortuary shall be taken or demanded of any, for any person dying within this Realm, whose moveable Goods at the time of his death extend not to the value of Ten Marks. 2. That no Mortuary shall be given or demanded but only in such places where by Custom they have been used to be paid. 3. That no person shall pay Mortuaries in more places than one, viz. in the place of his most usual dwelling or habitation, and there but one Mortuary. (4) That for a person deceased, having at the time of his death in moveable Goods, to the value of Ten Marks

(l) Flet. lib. 2.
cap. 50. Bract. l. 2.
fo. 60. Britton.
fol. 178. Co. sup.
Lietl. l. 3. cap. 3.
Sect. 287.
(m) Dr. & Stud.
lib. 2. c. 55.

(n) Cap. Statutum.
De Consuetud. in
Provin.

or more clearly above his Debts paid) and under the value of Thirty pounds, there shall not be taken above Three shillings and four pence for a Mortuary; and under the value of Forty pounds, not above Six shillings and eight pence for a Mortuary; and of the value of Forty pounds or upward to any sum whatever (clearly above his Debts paid) not above Ten shillings for a Mortuary.

5. That for a Woman under Covert Baron, or Child, or any person deceased, that at the time of his death was not a House-keeper, nothing at all shall be paid by way of Mortuary. (o) And here note, That Mortuaries ought to be satisfied out of the deads part only, That is, after, and not before the Goods be divided among the Wife and Children, where by the Custom of the Country she can challenge her Widows part, and they their Filial portions; yet they are to be paid before any Legacies whatever, for that a Mortuary is of the nature of a Legacy, yea, it is in the Law termed the principal Legacy. Concerning other persons exempted from Mortuaries, and of the extenstions and limitations, and other interpretations thereof, see the said Statute of 21 H. 8. at large.

(o) Stat. 21 H. 8. cap. 6.

13. If an Administrator compound for Forty pound with one who hath a Judgment of One hundred pound; this under-hand Composition shall not prejudice any other Creditor who is a stranger to it: For every Administrator ought to execute his Office lawfully, in paying Debts, Duties and Legacies, in such precedence as the Law requies, and an Agreement made between them and others, shall not be to the prejudice of a third person. (p)

(p) 8 Jac. Co. 8 part. 132.

In Action of Debt brought against an Administrator, it was the Opinion of the Court, That he might retain moneys in his own hands of the Intestates, to satisfy a Debt due to himself: But an Executor of his own wrong should not retain to satisfy his own Debt. (q)

Turner's Case.

An Administratrix *durante minori etate* of an Executrix, made divers Obligations unto the Creditors of the Testator, and afterwards took Husband: The Opinion of the Court in this Case was, That so much of the Goods of the Testators as amounted unto the value of the Debts paid, and undertaken for, the Husband might retain as his own. (r)

(q) Mich. 11 Jac. in C. B. Bond & Green's Case. Godb. 216. vid. Co. 5 part. Coulter's Case.

Debt against an Executor by an Original, who pleaded a Recovery against him in the Court of *Ipswich*, and that he had not any more Goods than what would satisfy the said Recovery, and the Recovery was after the Test of the Original Writ; but he aver'd, That before the Recovery he had not any notice of the Suit by the Original: And the Plaintiff demurr'd, and it was adjudged for the Defendant, be it whether he had any notice or not; for if one sue him, and give notice, yet he may confess the Action of another who commenced his Suit after the former, and therein may

(r) Mich. 15 Jac. in C. B. Briers and Goddard's Case. Hob. 250.

pleasure

pleasure his Friend, so as it be without fraud. But if he be sued by one upon an Obligation, and will pay another Debt by Obligation without Suit, there and in that Case if he hath notice of the Suit, it is a *Devastavit*; otherwise if he hath no notice thereof; and so in such Case the notice is material. Debt was brought against an Executor for 100 *l.* in *C. B.* Afterwards another Action of Debt was brought against the same Executor for 100 *l.* more in *B. R.* in which he confessed the Action, and pleaded the same to the first Action, and that he had fully Administred all but the said 100 *l.* And the Court inclined to be of Opinion, That the Plea was not good, but that the Executor was chargeable to the first Judgment. (f)

(s) More, Case
291.

Reliefs also, where they are due, are payable before Legacies, for Debt lies against Executors for Reliefs; for as an Executor may have Debt for relief by the Common Law, so Debt lies against him for the same: As in the Lord St. *Johns Case* against *Bawdrip*. The Case was thus, *W. B.* the Grandfather dies seised *T. B.* the Father of the Defendant at age, *T. B.* makes the Defendant his Executor, and dies. *S. J.* as Executor of an Executor, brought an Action of Debt for Relief against the Defendant, being Executor, &c. And well. *Vid. 20 H. 7.* And it was agreed by the Court, 1. That an Executor may have an Action of Debt for Relief by the Common Law, without Fealty, 32 *H. 8.* and that the Seisin of the Services need not be alledged, when the Executor brings Debt for Relief; otherwise when the party himself avows 2. That Relief is made certain by the Statute of *Magna Charta*, cap. 2. 3. That Debt well lies against an Executor for Relief: That Testator could not wage his Law for that, because it is certain, and a real Duty. And Judgment was given for *S. J.* And after Errour was brought, but the Judgment was affirmed.

Case of L. St. John
against Bawdrip.
Noy.

Moneys received by a Sheriff upon an Execution, if he die before payment, is a Debt to be paid by his Executor before any Legacy: As in the Case of *Perkinson* against *Gildford*, where *Berkley* said, The Sheriff having levied money, is as chargeable for so much in Debt to him that recovered as a Collector, by acceptance of a Talley, is chargeable in debt, 1 *H. 7.* And *Mallet* confessed That in the Common Bench it was adjudged, where the Sheriff return'd a *Fieri Feci*, Debt lieth against him. And they held That the Sheriffs Executors are as chargeable as himself. And *Jones* said, That where a Sheriff is Chargeable for levying of money, and not paying it over, it being a Duty, if he dies, his Executors are chargeable as well as himself; though for an escape it be otherwise, and his Executors in that Case are not chargeable; because that being a personal tort or misfeasance, doth only charge his person in his life, and not his Executors after his death, for that

that, as a personal Action dies with his person: But money received by a Sheriff, is a discharge to him that pays it; and therefore if the Sheriffs Executors should not be liable for it, the Plaintiff would be without Remedy, which the Law will not suffer. Such money therefore so received by a Sheriff, being a Debt in Law, he dying, ought to be paid by his Executors before any Legacies whatever.

Hill. 14. Car.B.R.
Perkinson ver.
Gifford. Cro.

C H A P. XXIX.

Of Executors Accountts.

1. *Executors obliged to Account. The Ordinaries Power therein.*
2. *Within what time an Executor ought to Account.*
3. *An Account judicially made shall not prejudice absent Creditors or Legataries, not duly summoned.*
4. *Law Cases touching this Subject.*

1. **T**O render an Account is not the least part of an Executors or Administrators duty, thereto obliged as well by his own Oath, as by the Law; in so much, that should the Testator himself discharge his Executor from making an Account, yet may the Ordinary at his discretion, in Case of Fraud, exact an Account from him. (a) Therefore the Ordinary may, if he please, call him to Account either generally or particularly, as the Case shall require; and that either at or without the motion or instance of the Creditors or Legataries, within a year, or what time he please; at which Account he may call all the Creditors and Legataries; and therein he must set forth what he hath received, what expended, and prove it too if need so require: And upon a just Account so made, the Ordinary may acquit him, whereby he is discharged of all Suits in the Spiritual Court. But as to that, the stile of each Court is to be observed. (b) And in the proof of such Accounts, the lesser sums, as under Forty shillings, may be proved by the Executors own Oath, the greater must be by due proofs.

2. The Executor ought to have a competent time for the performance of the Will, before he be called to an Account; which time ought to be a Twelvemonth: (c) Yet he may sooner be called to it by the Ordinary in case of Mal-Administration, or if the Ordinary see cause for it; (d) at least to a particular Account: But herein also the several stiles of several Courts are to be ob-

(a) Lynwood in c. Religiosa. verb. rationem de test. lib. 3. Provinc. Const. Cant. & Jo. de Athon. in mag. Gloss. in Legation. Libert. de Exec. Testa. & Jo. de Canib. & Olden. Locis Citatis.
(b) Swinb. part 6. §. 20. nu. 4.
(c) L. nulli C. de Ep. st. & Cleric. & Boic. in c. tua. nobis; de Testa. Extra. Covar. in c. 3. eod. tit.
(d) Lynw. ubi sup. verb. Congr. & verb. rationem reddere.

(e) Menach de
Caf. 209. in fin.
Bro. Abridg. tit.
Admin. nu. 14.
(f) L. femel C. de
Apochi & Olden.
de Exec. ult. vol.
tit. 8. nu. 17.

(g) Jo. a Canib.
de Exec. ult. vol.
2. part §. novissi-
mum.
(h) Spec. de Inst. n.
edit. §. nunc veto
nu. 45. & Lynw.
in c. Statutum §.
& postquam
verb. Ordinaris.
(i) L. de uno quog;
ff. de re jud.
(k) Lynw. ibid.
verb. rationem
in fin. Glos. ibid.
(l) L. 2 C. de
Adm. tut.
Case Sparrow
against Norfolk.
Noy.

served. And in this Accompt the Funeral, Debts, Legacies, and moderate Expences ought to be allowed to the Executor so far as he hath really paid, or is obliged to. And the Executor having made a full and just Accompt, ought to be acquitted and discharged of all further Suit, if it be such an Accompt of his whole Office; (e) neither is he to be called by the Ordinary to any further Accompt. (f)

3. No Executor is obliged to make any Accompt to the Creditors or Legataries extra-judicially; (g) but at their instance to the Ordinary he is compellable to it judicially: And at the making of such Accompt they and all others having, or pretending to have Interest are to be summoned Legally to be present; (b) Otherwise the Accompt made in their absence, and they not summoned, will not prejudice them. (i) And yet extrajudicially an Executor may exact an Accompt of his Co-executor, but not in Judgment or judicially; (k) but the Ordinary, as aforesaid, may call them both or either of them to a Judicial Accompt, (l) by the Civil Law, not so at the Common Law: For that Executors are not compellable to Accompt, appears by Sparrow's Case against Norfolk. B. Administrator of A. makes C. his Executor and dies, C. is sued in the Spiritual Court to make Accompt of the Goods of A. the first Intestate: And C. now moves for a Prohibition, and had it; for an Executor shall not be compell'd to an Accompt. Note, the Statute 21 H. 8. gives power to the Ordinary, but not for Accompts. But an Administrator shall be compelled to Accompt before the Ordinary.

Nor shall an Executor have an Accompt against his Companion: as in Bellamy's Case against Alden, where an Administrator Accompts before the Ordinary, and a Creditor of the Intestate took Exception to it, and averr'd, That the Administrator had not paid so much: And the Administrator proved payment by one Witness, and for default of better proof, he was Excommunicate. And a Prohibition was granted, because the Ordinary had not power in such a Case to hold Plea, and to try the payment or not payment, or Administer an Interrogatory to a Witness, but ought to accept the Accompt as it is. For the Creditors may sue for their Debts at the Common Law, and then payment or not payment shall be well tried, and there one Witness will suffice, 13 Ed. 3. Exec. 91. An Executor shall not have an Accompt against his Companion.

4. An Administrator exhibited an Inventory in (1) the Spiritual Court of several Debts due to the Testator, and divers Goods which came to his hands: And then one of the Testators Daughters there sued the Administrator to Accompt, and that out of the Assets remaining, she might have a Childs Portion. To which the

Bellamy's Case
vers. Alden. Noy.
(1) Hill. 12 Jac.
B. R. Case James
vers. James. Roll
Rep.

the Administrator pleaded a Deed of Gift made by the Testator to another of his Daughters of all his Goods and Chattels; which Plea was there rejected: Whereupon a *Prohibition* was prayed. It was in this Case agreed by *Co.* and *Dod.* that the Ordinary may compel an Administrator to Accompt, and *Co.* cited 9 *Ed.* 4. & 7 *H.* 7. to this purpose: And that according to *Lynw.* the Probate of Testaments came to the *Spiritual Court per magnatum assensum* (that is, by Statute) for that it is not so in other Kingdoms. But in this Case it seemed to *Dod.* That the *Prohibition* should not be granted, for that possibly the cause or reason why that Plea was rejected, might be because it was not made or done in due form of Law: And it is well known, that there are Pleas in Bar of an Accompt, and Pleas before Auditors, and so possibly might that Plea be: Nor doth it here appear for what cause or reason they rejected that Plea: But *per Curiam*, for that they have rejected the Plea, a *Prohibition* shall be granted as to so much of the Goods as pass by the Deed of Gift; but not as to the Debts and things in Action, which cannot pass by the Deed of Gift, and for which the Administrator ought to accompt. And the Court had no regard to an Objection; *viz.* That the Administrator at first confessed he had Assets, whereof he exhibited the Inventory, that therefore this later was repugnant thereto: For *Co.* said, That was no Estoppel or Bar in this Case; therefore the Order was, That a *Prohibition* should be granted, unless a *Civilian* appeared in Court before such a day, and shew some reasonable Cause why or wherefore the said Plea was rejected in the *Spiritual Court*: The said Order was made, for that *Dod.* doubted, whether they had rejected the said Plea for default of any Form in Law.

A. after many Legacies, devises the residue of all his goods to *B.* and makes *C.* his Executor and dies. *C.* after accompts before the Ordinary, and pays the residue to *B.* and thereupon has an Acquittance from the said *B.* *C.* dies, and *B.* sues his Executor in the Court of Requests, to accompt *de novo*: The Executor pleads the Acquittance, and the Plaintiff thereupon demurred: *Cook* Attorney General prays a *Prohibition*, and the Court said, That an Executor shall not be compelled to Accompt in any Court, although the Court of Conscience: But by the Court it was agreed (1) *Hill.* 2. *Jac.* B. That an Executor of an Executor, may be sued for a Legacy R. Taylor vers. Trots Executor. given by the first Testator. (1) Noy.

C H A P. XXX.

Of Administrators in a Notion distinct from Executors.

1. *Administrator, what he is in the Law.*
2. *The Origination of an Administrator, by and to whom Letters of Administration are to be granted.*
3. *What provision of Law in Case of an Administrator after an Executors death.*
4. *What the Law is, in case a Stranger doth Administer, or the Ordinary grant his Letters ad Colligendum.*
5. *In what manner Administration is to be granted.*
6. *Of Administration durante Minoritate.*
7. *In what Cases Letters of Administration may be granted.*
8. *Law-Cases touching this Subject.*

1. **A**N Administrator is in the Law called *Executor Dativus*, because as such he is constituted or appointed by the Ordinary. As by the Statutes, so by the Common Law of this Realm, an Administrator is properly taken for him that Legally hath, or in his own wrong illegally, the Goods and Chattels of a person dying Intestate, or hath Administred to the same; but more properly, that hath them committed to his trust and charge by the Ordinary, and is accountable for the same whensoever it shall please the Ordinary to call him thereunto; and this is done for default of an Executor. Such Administrations proceed not so much from the Civil Law (which only appoints Heirs, and the Rights of Succession) as from the Pretorian or Law of Conscience, whereby the deceased's Children may take it at any time within a year next after his death: But if of kin of a farther degree, then within 100 days, save in some few Cases, wherein a longer time is allowed.

2. By the Constitution of *Leo* the Emperor, it was Enacted; That if a man dying bequeath any thing for the Redemption of Captives, &c. and appoint one to execute the Will, in that point, the party so appointed should see it performed; but if he appointed none to do it, then was the Bishop of the City authorized to demand the Legacy, and therewith to perform the Will of the deceased without delay. (a) From whence it is probably conjectured, that the Administration of the Goods of persons dying Intestate, granted by Bishops and others of Ecclesiastical Authority and Jurisdiction under them, was Originally derived. For it was anciently Ordained, (b) That the Goods of those dying Intestate should be com-

(a) L. nulli licere
28. Cod. Epif. &
Cleric.

(b) Westm. 2.
an. 13 Ed. 1. c. 19.

committed to the disposition of the Ordinary, who should be obliged to answer the Deceased's Debts so far forth as his Goods would extend unto, even as Executors themselves in the like case. And after this by another Statute, (c) power was given to the Ordinary to appoint Administrators, and to authorize them as fully as Executors, to gather up and dispose the Goods of Intestates: Always provided, that they should be accountable for the same as Executors; by which Statute it is ordained, That the Ordinaries shall depute the next and most lawful Friends of the Intestate to be his Administrators; who then in Law have nigh in all things equivalent power with Executors. (d) Inasmuch, that whatever hath been or may be spoken of the one, may nigh in all points be properly applied, and aptly accommodated to the other. And if the Executors refuse to prove the Will, the Ordinary may commit the Administration till they accept the Executorship. (1) And lastly, in confirmation of the premises, it is enacted by a latter Statute, (e) That in case any person die Intestate, or having made a Will, the Executor therein named refuse to prove the same, the Ordinary, or others authorized for the Probate of Testaments may grant Administration to the deceased's Widow, or to the next of his Kin, or to both at the Ordinaries discretion, taking Surety from them for the due Administration. (f) And by the same Statute it is further Enacted, That if divers persons claim the Administration as next of Kin, which be in equal degree of kindred to the deceased, and where any one person only desireth the Administration as next of Kin, where indeed divers persons be in equality of kindred, then in every such Case the Ordinary is at his Election and Liberty to accept, any one or more making request, where divers do require the Administration; which after the death of Father or Mother Intestate, is to be granted to the Father or Mother: (2) And the Ordinary may grant it to the Brother of the whole Blood, or to the Sister of the half-Blood at his choice; but not to Husband and Wife, where the Husband is not of Kin to the Intestate. (3) And the Mother ought to have the Administration of the Goods and Chattels of her Intestate Child, before a Son, Brother or Sister. (4) The Husband is not *de Jure* to have the Administration of his Wife, as the Wife is to have of her Husband; but the Ordinary may, or may not commit it to him. (5) *Sed Q.* And one of the half-Blood is in as equal a degree of Kindred to an Intestate, to have Letters of Administration granted to him, as one of the whole-Blood. (6) And where they that sue for the Letters of Administration are in equal degree of Kindred to the Intestate, there it is in the discretion of the Ordinary to grant them to which of them he pleases: Yea, it was said by *Periam* Justice, and *Mamwood* Chief Baron in

(c) 13 Ed. 3. c. 11.

(J) 38 Ed. 3. fol. 26. & 41 E. 3. fol. 2. & 37 H. 6. f. 15. Dyer f. 236.

Co. lib. 5. f. 9. & lib. 6. f. 18. & lib. 9. f. 38. & Co. Inst lib. 2. cap. 11.

Sect. 200. f. 313. b. & Regist. f. 141. V. N. B. f. 61. Fitz.

N. B. f. 120. D. & Raft. plaf. 320.

(1) Hob. 144. (e) 21 H. 8. 5.

(f) Bro. Administ. 47. & Co. lib. 3. fol. 40. & lib. 2. fol. 39.

It was resolved by all the Justices against the Statute of 5 E. 6. That the Father and the Mother are the next to whom Administration shall be granted of the Goods of the Son or Daughter who die Intestate

34 El. Co. 3. part in Ratcliffs Case.

(2) Co. 3. Ratcliffs Case.

(3) Styles. 74 102.

(4) Styles Regist. 21.

(5) Cro. 3. 106.

(6) Styles Regist. 22.

the Case of *Filcocks* and *Holt*, That the Bishop may grant Letters of Administration to whom he please, if he will forfeit the penalty limited by the Statute-----*Mich. 32, & 33 Eliz.* in the Exchequer-----*Lacn.*

(g) Bro. Exec.
117. 26 H. 8. 7.
Coke 1. 69. Dyer
372. Terms of
Law tit. Admin.

(h) Fitz. Admin.
inst. 9.

(i) Dyer 371.

(k) Terms of
Law verb. Admini-
istrator.

3. An Executor, after Probate made, dying Intestate, the Administration of the first Testators Goods not Administred may be granted to whom the Ordinary shall see cause in Law; and he may grant the Administration of the Goods both of the first and second deceased *de bonis non Administrais* to one and the same person; in which Case the Administrator ought to see, that his Administration have special words for granting the Administration of the first Testators Goods not Administred. (g) For though some are of Opinion, that by the general Administration the Administrator shall have not only the Executors, but the Testators Goods also, yet this is otherwise held for Law at this day. (h) And an Action shall lye for or against such an Administrator, as for or against an Executor, and he shall be charged to the value of the Goods of the deceased, and no further, if it happen not otherwise by his own false Plea, or for that he hath wasted the deceased's Goods: But if the Administrator die, his Executors do not succeed him in that Administration, but the Ordinary is to commit a new Administration. The Law is the same when an Executor dieth before he hath proved the Will, or Administred any of the Goods; in which Case a new Administration is to be granted to the Widow, or next of Kin of the first Testator, with the Will annexed, unless he had also bequeathed the residue of his Goods unto the said Executor; for in that Case the Administration of his Goods belong unto the Widow or next of Kin of the Executor, and not of the Testator. Or if an Executor be made universal Legatary, and die before he hath proved the Will of the Testator; in this Case likewise the Administration of the Testators Goods doth belong to the next of Kin of such universal Legatary, and not of the Testator. (i)

4. If a Stranger that is neither Administrator nor Executor, take to himself the deceased's Goods, and Administer of his own wrong, he shall be charged and sued as an Executor, and not as an Administrator in any Action that is brought against him by any Creditor: But if the Ordinary make a Letter *ad Colligendum bona defuncti*, he that hath such a Letter is no Administrator, but the Action lieth against the Ordinary himself, as well as if he took the Goods into his own hands, or by the hands of any of his Servants by any other Command or Order. (k) And note, that if an Administrator doth alienate or convert to his own use all the Goods which did belong to the Intestate; in this Case an Action doth lie against the Executor of that Administrator, and is liable to be charged for the Debts due by the Intestate, which is otherwise of an Executors Executor. 5. An

5. An Administration must pass under Seal in Writing, not by word of mouth; for the Ordinary cannot commit Administration by word of mouth; otherwise it is, if it be entered into his Registry, though Letters of Administration be not formally drawn,

(1) Yet it may be granted as well upon condition as absolutely, and as well for part, as for the whole Estate; so that a man dying possessed of Goods in two Provinces, making his Will of the Goods only in one of them, and dying Intestate as to the Goods in the other Province, Administration may be granted as to the Goods of that Province whereof he died Intestate: Likewise Administration may be granted only for or during some certain limited time. (m) Also an Executorship limited to a certain time, the Ordinary ought to grant Administration after the expiration thereof; or if a man appoint an Executorship not to begin till some certain time after the Testator's death, Administration is to be granted till that time doth commence. (n) And where the Ordinary hath once granted the Administration, where *de Jure* it ought to be granted, there he may not afterwards repeal the same: For the Case was *A. B.* had a Wife whose name was *Briget*, after whose death he took another Wife of the same name, and then he died Intestate. The second Wife took Letters of Administration of her Husband's Goods: The Son sued in the Prerogative Court to repeal those Letters of Administration, upon pretence, that *Briget* the first Wife was living; It was adjudged *per Curiam*, That where the Ordinary hath granted Letters of Administration to one who ought to have them, that in such Case, they ought not to be repealed by the Ordinary. (1) Also where an Executor is made conditionally, and the Condition yet depending, it is for prevention of prejudice to Creditors and Legataries, provided, that the Ordinary may commit Administration to the said conditional Executor only, during the dependency of the Condition; (o) but upon infringement or defect of the Condition, Administration is to be granted to the next of Kin.

6. There is also an Administrator *durante minori etate*, which is a special kind of Administration, and is only in Case where an Infant, under the age of Seventeen years, is made Executor: In which Case the Administration is committed to one or more of the next of Kin of the Infant during his Minority, that is, till he be capable of the Executorship, which is at the Age of Seventeen years: The power of such an Administrator is Equivalent to the power of other Administrators; (q) and therefore if it be granted during the Minority of several Joint-Executors, all under the Age of Seventeen Years, and one of them die, or attain to the Age of Seventeen Years, then is the Administration determined; so also it is, if a Feme-minor Executrix take a Husband of that

Age.

(1) 21 H. 6. 2. 3.

How Administrations shall be taken.

Vid. Cro. 2. 16. Johns vers. Row.

(m) Dyer 294.

Fitzh. Administr.

5. 34. H. 6. 14.

& Plowd. 279.

(u) Brownl Rep.

1 part. 5. 2 part.

119. Hob. 2. 56.

144 Anderf. 2.

132. 150. Cro. 3.

293, 294. Mor.

Case 910.

(1) Pasch. 23.

Car. B. R. Beles-

worthis and Be-

tisworthis Case.

Styles 10.

(6) L. si quis in-

stituatur. §. 1. & 2.

ff de hæc. instit.

(p) L. 2 §. si sub.

Condit. de bon.

poss.

(q) Coke 5. 29. 6.

279. 27.

(r) Brownl. Rep. age. (r) And if such an Administrator *durante Minori ætate* get
part. 1. 31. 4. 6, 47.
80. 101. & part.
2. 83. 148.

a Judgment, and before Execution the Infant-Executor doth come of age, the Executor himself may have Execution of this Judgment: So that if an Administrator, *durante Minori ætate*, obtain a Judgment, and the Executor come of full age, it seems he may not have the Execution of this Judgment. (2)

(2) Cro. 1. 157.

7. To the several reasons and causes, for granting of Letters of Administration mentioned in the premises, may be added, That if a Testament be not made with all Freedom, as it ought to be, *viz.* without fear of Loss, or hope of Gain, without Threats, Flattery, Fraud, or Collusion; without Error, Uncertainty, Fallacy, Imperfection, Cancelling or Revocation; or if the Testator, be a person incapable of making a Testament; or if his Will, contrary to the nature of Wills, depend upon another mans Will, or otherwise, the party dying Intestate, as aforesaid, or Testate, and the Executor refuse to prove the Will: In all these Cases, the Administration is to be committed to the Widow or next of Kin to the Intestate, (f) sometimes with the Will annexed, if there be any, and in some cases not: But the Administration is not to be committed according to the Statutes, to the Widow or next of Kin, in Case of suspending the Probate by reason of the yet dependency of some unaccomplished Condition in the Will, but to him that is made Executor, and that only for and during so long time as the Condition dependeth; for in this Case the party is not Intestate, so long as the Condition is accomplishable or performable. Again, if the Mind, Will and Intention of an Intestate touching the disposition of his Goods and Chattels be declared, though for want of making an Executor he die Intestate, (t) so as Administration is to be committed; yet for that here is not only an Inchoation, but in part a Progression of a Will, it is to be annexed to the Letters of Administration, and to be observed and performed by the Administrator.

(f) 21 H. 8. 5. 31
Ed. 3. cap. 11.

(t) Jul. Cla. 1.
Testa. 9. 5. nu. 2.

8. In *Detinue* brought by an Administrator of a *Chain*, of which the Intestate died possessed, and which after came to the Defendants hands: The Case was, upon a special Verdict, That the Administration was Committed to the Defendant in *London* by the Bishop of *Cork*, being in *London*; but they did not find that the Defendant was possessed of the *Chain* in *London*: And in this Case these points were resolved. (1) That a Bishop of *Ireland* being in *England*, might commit Administration of things in *Ireland*, because it is but a Power and Authority which follows his person, wheresoever it is. (2) That an Administrator made by a Bishop of *Ireland*, could not bring an Action here as Administrator, because of the Letters of Administration granted in *Ireland*, there could be no Tryal here. (3) That an Administrator might declare of his own possession, although he was never possessed, if the Intestate

at the time of his death was possessed, for that the Law calls a possession upon him. 4. That upon a general Issue pleaded, the Jury might find a Foreign matter, as a thing done out of *England*. 5. It was resolved, That in the Principal Case, the substance of it was the possession, and not the Administration. It was adjudged for the Plaintiff. *Pasch. 27 Eliz. in C. B. Carter and Crofts Case Godbolt 33. Vid. Dyer 304.*

If the King be indebted to a man at the time of his death, who died Intestate within the Diocese of *Lincoln*, and the Administration of his Goods and Chattels be granted by the Bishop of *London*, the Administration is void: Or if when the Administration is grantable by an *Ordinary* of any particular Diocese, it be granted by the *Metropolitan*, such Administration, though it be not void, yet is voidable by Sentence in the same Court whence it issued.

In *Luknor's Case* it was held, that the *Ordinary* of the place where an *Especialty* is at the time of an Intestates death, shall grant the Administration of his Goods, and not the *Ordinary* of the place where the *Especialty* was made, and the Debt began or took its original. (8) Also the *Ordinary* may commit it to the Widow or

next of Blood, or both, or to some or all of equal degree that sue for it: But regularly in this method, *viz.* 1. To *Husband* or *Wife*.

2. If none such, then to the *Children*, Sons or *Daughters*. 3. If

none such, then to the *Parents*, *Father* or *Mother*. 4. If none such,

then to *Brothers* or *Sisters* of the whole-Blood. 5. If none such

then to *Brothers* and *Sisters* of the half-Blood; or to the whole

and half Blood both. 6. If none such, then to *Uncles* and *Aunts*.

7. If none such, then to the next of Kin, though more remote:

Or in case none of these sue for it, then the *Ordinary* may grant

Letters *ad Colligendum*, or Letters of Administration to a *Creditor*

suing for it; or to a stranger, subject to a Revocation by the next

of Kin to the Intestate, that shall afterwards sue for it; (9) or in

some Cases to a Residuary Legatary. (10)

A Lease in Reversion for years was granted to *A. B.* who died

Intestate, his Wife assign'd it to *C.* and afterwards took Letters of

Administration, and made an assignment of it to the Plaintiff. It

was resolved, that the last Assignee should have it. (11)

A. acknowledged a Recognizance to *C.* who made *C.* his Exe-

cutor, and died: *C.* sues an Extent against *A.* and before Inqui-

sition *C.* also dies: After the death of *C.* the Sheriff takes the

Inquisition, and then *D.* takes Administration *de Bonis non Admini-*

stratis, and takes a *Liberate*, and had the Lands delivered in Ex-

tent. In this Case it was held, That if the *Liberate* had been

awarded and returned, and then the Executor had died before his

Entry, that then and in such Case the Administrator should have

had it, and might have entred. (12)

(8) 14 Eliz. Dyer 303. Luknor's Case.

Resolved by all the Justices against the Stat. of 5. Ed.

6. That the Father and the Mother are the next

to whom Administration shall be

granted, of the Goods of the Son

or Daughter dying Intestate.

(9) Co. 5. 29. Dyer 303. Bulst. 2. 34

Popham 37.

Co. 8. 135. Co. 9. 39. 3. 40. 4 H. 7. 14.

(10) Styles Reg. 22.

(11) Mo. Case. 257.

(12) Hill. 11 Jac. B. R. Cleave & Beane.

(13) Dyer 160.
Lit. Bro. Sect.
169. Bro. Exec.
179. Fitz. Exec.
12. 113. Dy. 187.

In Case two Executors, whereof only one proves the Will, and dies Testate, his Executor is now the first Testators sole Executor, because by and upon the death of the Executor, who so proved the Will, was determined the power and election of the other nominated Co-executor surviving who refused. Otherwise, in case both the Executors had accepted the Executorship; for in that Case, if one of them die Testate, the surviving Executor shall be sole Executor, and the Executor of the deceased Executor shall be excluded as to the Goods of the first Testator, whereof if he hath his in hands, he must accompt to the surviving Executor for the same. (13)

(14) Yelv. 33.

The Administrator of the Goods of *A.* hath Judgment for a Debt due to *A.* and dies before Execution: In this Case, his Executors (if he died Testate;) or Administrators (if Intestate) shall never have Execution of this Judgment. And one Administrator may not have a *Scire Facias* to have Execution of a Judgment had and recovered by a former Administrator, and Administration. (14)

(15) M. B. R.
1655. Ingram
& Pawlet's Case.
Styles 463.

If an Administrator bring an Action against an Administrator, it is not necessary for the Plaintiff to shew by whom the Letters of Administration were granted to the Defendant: But he must shew by whom Letters of Administration were granted to himself, to entitle him to the Action; for if it appear not to the Court that he is Administrator, he cannot sue (15)

(16) Mic. 15 Jac.
C. B. Briers &
Goddard's Case.
Hob. 250.

An Administratrix *durante Minori ætate* of an Executrix, made divers Obligations to the Testators Creditors, and afterwards took Husband: And the Opinion of the Court was, That so much of the Goods of the Testators as amounted unto the value of the Debts paid, and undertaken for, the Husband might retain as his own. (16)

(17) Mic. 23 Car
B. R. Styles 74.
75. vid. Pasc. 24.
Car. B. R. Hill. &
Birds Case. Styles
102, &c.

In the Case of a Prohibition granted to the Ecclesiastical Court, for granting Letters of Administration to a Sister of the half-Blood, when there was a Brother of the whole Blood who sued for them. It was agreed by the Court, that it is in the power of the Ordinary to grant Administration to the Brother of the whole-Blood, or to the Sister of the half-Blood, at his Election, because they are of equal degree of Kindred to the Intestate. But if Administration be granted to Husband and Wife, where the Husband is not of Kin to the Intestate, but a stranger; if he survive, he should have all the Goods, and the Kindred be defrauded, which is not reasonable: And therefore such Administration shall be void. (17)

An Administrator brought an Action of Debt for Rent, which was found for the Plaintiff, and Judgment given. Exception was taken that the Plaintiff had not shewed by whom the Letters of Admi-

Administration were granted to him : But the Opinion of the Court was, That it was too late to shew that after Verdict ; for that the Jury have found, that the Administration was duly granted. And it was said in the Court, That in a Declaration it is not necessary to shew by whom the Letters of Administration are granted ; or to say that they were granted by him *cui pertinuit*, or *per loci illius Ordinarium*. (u) Yet note, that it was said in another Case, That if an Administrator bring an Action against an Administrator, it is not necessary for the Plaintiff to shew by whom the Letters were granted to the Defendant, but he must shew by whom the Letters of Administration were granted to himself to entitle him to the Action ; for if it appear not to the Court, that he is Administrator, he cannot sue. (w)

If an Infant be made Executor, Administration, during the Minority of the Infant, may be committed to the Mother ; and the same shall cease and be void, when the Infant is of the age of Fourteen years : But such Administrator cannot sell the Goods of the Testator, unless it be for necessity of payment of Debts, because he hath the Office of Administrator only *pro bono & commodo* of the Infant, and not to its prejudice. (x)

Note, it was resolved *per Curiam*, That an Administration *durante minori etate* of an Executrix, was not within the Statute of 21 H. 8. of necessity to be granted to the Widow of the Testator, because there is an Executor all the while : Otherwise, if the Executor were made from a time to come. (y)

An Infant was made Executor, and Administration was granted to another *durante minori etate* of the Infant, who brought Action of Debt for money due to the deceased, and had the Defendant in Execution, and then the Executor came of full age. It was moved that the Defendant might be discharged out of Execution, because the Authority of the Administrator was determined, and he cannot acknowledge satisfaction : And it was said, That he was rather a Bailiff to the Infant, than an Administrator : But the Judgment of the Court was, That though the Authority of the Administrator was determined, yet the Recovery and Judgment did remain. (z)

In an Account brought by an Administrator *durante minori etate* against the Defendant as Bailiff of such a Mannor ; it was found for the Plaintiff : It was moved in stay of Judgment, That it is not shewed, that the Executor the Infant was within the age of Seventeen years, and it might be he was above the age of Seventeen years, and yet under age : but the Opinion of the Court was that it shall not be so intended, unless it be shewed, that he was above Seventeen years ; and especially when the Defendant had admitted him to bring the Action, and had pleaded to Issue

(u) Trin. 1651. in B. R. Marshall & Ledham's Case. Styles 282. vid. 1. Jac. in Excheq. Chamb. Wade and Atkins. son's Case adjudged contrary 2 Cro. 10. Hugh. Abridg. tit. Administrator.

(w) Mich. 1655. in B. R. Ingram. & Fawlers Case. Styles 463.

(x) Co. 5. part. Prince's Case, 59.

(y) Mich. 15 Jac. C. B. Briers & Goddard's Case. Heb. 250.

(z) Mich. 29. Eliz. in C. B. Goldb. 104. Mich. 7 Car. B. R. Wells & Some's Case. Cro. 1 part. 174. Vid. Mich. 9 Car. Dorchester & Wells Case, Cro. Rep. part. 1.

Mich. 41 & 42
Eliz. Prince and
Simpsons Case.
Anderl. Rep.
Cal. 53.

Between P. and S. the Case was : An Infant was made Executor to whom certain Leases among other things were devised, and Administration during his Minority committed to one, who sold and alienated the Leases. It was agreed by the Justices, That the Administrator could not sell the Leases, unless there were good and reasonable cause moving thereunto, as in case there were no other Goods save the Leases, wherewith to pay the Testators Debts, which ought of necessity to be paid, the Leases may to that end and purpose be sold, otherwise not ; but Beasts and other things which cannot long be kept or preserved, especially fat Beasts, Corn, or the like, may be sold. And of this Opinion was the Chief Justice of the Kings Bench, and the Chief Baron.

Hill. 38. Eliz. C.B.
Byron verl. Byron.
Cro. Rep.
par. 3.

Debt as Administrator of B. upon an Obligation, the Case was, That the Intestate died in *Lancashire*, but the Obligation was at *London* at the time of his death, and the Bishop of *Chester*, in whose Diocese he died, committed Administration to J. S. who released to the Defendant ; and the Archbishop of *Canterbury* committed the Administration to the Plaintiff : and this Release was pleaded in bar, and it was thereupon demurred. *Warberton*, Every Debt follows the person of the Debtee, and *Chester* is within the Province of *York*, where the Archbishop of *Canterbury* hath nothing to do. *Anderson*, Where one dies who hath Goods in divers Diocesses in both Provinces, there *Canterbury* shall have the Prerogative ; otherwise there would be two Administrations committed, which is *Res inaudita*. The Debt is where the Bond is, being upon a Specialty ; but Debt upon a Contract follows the person of the Debtor ; and this difference hath been oftentimes agreed, *vid. Dyer*. 305. And if the Archbishop of *Canterbury* hath not any Prerogative in *York*, but that several Administrations ought to be committed, yet at leastwise Administration for this Bond ought to be committed by the Archbishop of *Canterbury* ; wherefore the Release is not any Bar.

(1) Cro. 1. 719.
(2) Cro. 1. 71. 719.
Price verl. Simpson.

An Administrator special, *durante Minori etate* of an Executor, may not grant a Term, nor sell Goods, except *Bona peritura*, or for necessity, for payment of Debts ; but may sue and be sued : (1) Yet it hath been doubted, whether such an Administrator may assent to a Legacy. (2)

(3) Yelv. 130.

(4) Latch. 160.
Co. 6. Packman's
Case.

If there be two Executors made, whereof one of them is within age ; and Administration be granted *during his Minority* : In such case one of them may not bring an Action in his own name, but they must both joyn in the Action. (3) And if such an Administrator *durante Minori etate*, commit a *Devastavit*, or waste the Goods, after the Minor came of age (that is, of age for an Executorship, or of Seventeen years :) In such Case, he is to be charg'd upon the special matter, and not as Executor of his own wrong. (4)

One

One possessed of Cattel, Corn, Moveable-goods, and of a Lease for years of Lands, made his Will, and thereby made his Wife Executrix of all his Cattel, Corn and Moveable-goods, not mentioning what shall be done concerning the residue of his Estate, and made no other Executor. The Wife proved the Will, and Administration was committed to her *omnium bonorum, jurium & Creditorum prædict.* (her Husband) & *ejus Testamentum qualitercumq; concernen.* The Question was, Whether this be a general Administration committed, or only an Administration of the Goods of which she was made Executrix. *Berkley* Justice held, That it was but a special Administration, because it is *Bonorum, jurium & Creditorum præd'* (the Husband) & *prædict. Testamentum concernent.* But the greater opinion of the Court was, That it was a general Administration committed: For *Jurium & Creditorum* are general words, and the word (*Et*) should be expounded as (*Aut*;) and it cannot be tied only to the Testament, for there be not any words of Debts, as *Creditorum* imports. (5)

In Debt brought by an Administratrix, upon an Administration granted by the Bishop of *R.* The Defendant pleaded an Administration committed to him by the Dean and Chapter of *Canterbury, sede Vacante*, because the Intestate had *bona Notabilia.* The Plaintiff replied, That the said Administration was repealed: And it was adjudged for the Plaintiff: 1. Because the Defendant did not shew what *bona Nota bilia* the Intestate had in certain: And it shall be intended he had not *Notabilia*, and such Administration is but voidable. 2. Because before the Repeal of the Administration by the *Metropolitan*, the inferior Ordinary may commit Administration; and when the Defendants Administration is repealed, it is void *ab initio*: And in the principal case it was resolved, That whereas the Administration was committed to the Obligor, that the Debt was not extinct, because it is in anothers right: Otherwise it is, if the Obligee himself made the Obligor his Executor. (6)

Debt against the Defendant, as Administrator of *F.* he pleads a Recovery against him as Executor, and besides, to satisfy that he hath not any *Assets.* And it was thereupon demurr'd and adjudged to be a good Plea, and he shall not be twice charged; wherefore it was adjudged for the Defendant.

Debt against the Defendant as Administratrix of *T. H.* her Husband, upon a Lease to the said *T.* by Indenture for years, and how the Defendant is Administratrix to him: And for Rent-arrear after his death the Action was brought in the *Debet* and *Detinet*: Upon *Not-guilty* pleaded, it was found for the Plaintiff, and now moved in Arrest of Judgment, That the Declaration was not good;

(5) Trin 7 Car.
B.R. Rot. 497.
Rose & Bartlet's
Case. Cro. 1. par.
213.

(6) 8 Jac. Co. 8.
par. Sir John
Needham's Case
fol. 135.
Hill. 40 Eliz. C. B.
Smalpeace vers.
Smalpeace. Cro.
Rep. par. 3.

Pasch. 41 Eliz. B.
R. Body vers.
Hargrave. Cro.
Rep. par. 3.

good ; for that, &c. And at another day it was moved, That this Declaration ought to have been in the *Detinet*, and not in the *Debet* and *Detinet*, because she hath the Term as Administratrix, and is not charged by her own Contract, but by an Act of the Testator, and to that purpose was cited 19 H. 8. 8. 10 H. 5. 7. And a president was shewn in C. B. between *Barker* and *Kelsey*, where the Action was brought in the *Detinet* only. And *Godfrey* affirmed, that in *Fenn's* Case in this Court it was Ruled, That the Action ought to be brought in the *Detinet*. *Gawdy*, The Action is well brought in the *Debet* : For this Rent, though Arrear after the death of the Intestate, begun first in the Administratrix, and therefore the Action well lies against her in the *Debet* ; For the reason why the Action against an Executor shall be in the *Detinet* is, for that the Debt grew due by the Testator ; and therefore it cannot be said that Executor *Debet*. But in an Action against the Heir, it shall be in the *Debet* and *Detinet*, because he is bound by special words in the Obligation ; and here the Debt which in the time of the Administratrix occur'd, is her Debt ; and in *Dyer*, 6 Ed. 6. 81. the Action is brought in the *Debet* and *Detinet* for Rent arrear in the time of the Executor, and admitted to be good. *Pepham* accord. For the being charged with the Rent in her time, it accrews by reason of the profits of the Land which she herself received, and therefore she is charged, having *quid pro quo*. For if an Executor hath a Lease for years of Land of the value of Twenty pound *per ann.* Rendering Ten pound *per ann.* Rent, it is Affets in his hands only for Ten pounds over and above the Rent. *Fenner* agreed to this Opinion, and to that purpose cited 10 H. 6. 11. That the Husband shall be charged after the death of the Feme, for Rent-arrear in his own time, because he received the profits of the Land : So as the Rent grew due in respect of the occupation and taking of the profits. And therefore she is chargeable, and not merely as Executrix : *Clinch* agreed with them ; wherefore it was then adjudged for the Plaintiff. Note, That afterwards this Judgment was reversed in the Exchequer Chamber for the point in Law : For all the Judges of the Common Bench, and Barons of the Exchequer held, That she ought to be charged in the *Detinet*, because she is charged only by the Contract of the Intestate. 5 Co. 31.

The Case was : One died Intestate in the County of *York*, and a stranger prayed Letters of Administration to be granted to him, which was repealed by the Delegates in *York* : There was an Appeal to the Court of Delegates, in the Chancery, who did repeal the former Sentence at *York*, and adjudged, that the party made no Will, and granted Letters of Administration to him who appealed to them. The Archbishop of *Canterbury* granted Administration
 Mich. 10 Jac. B.R. Stephenfon verf. Wood. Bolst. par. 2, 3, & 4

tion to a second person ; and the Arch-bishop of *York* to a third person, who made a Release unto the Debtor of the Intestate : Upon which Release, Debt was brought by the first Administrator against the Defendant, who pleaded the Release made to him : And whether this Grant of Letters of Administration by the Judges Delegates were good or not, was the Question. But the better Opinion of the Court was, That the Letters of Administration, which were granted by the Judges Delegates, was not good : but there being *bona Notabilia*, the Administration was to be granted by the Archbishop : And it was said, That if the party who died Intestate, had Goods in several Provinces, both the Archbishops there having a peculiar, might grant Letters of Administration And although the King be Supreme Ordinary, and by Delegates may do many Acts ; yet the Court of Delegates cannot do this, nor have they power to prove any Wills ; for the power of the Judges Delegates, is, *Potestas Delegata corrigere non exequi* : And the Court said, That it was adjudged in one *Brakenburies Case*, That the Judges Delegates had not power to grant any Letters of Administration. Notwithstanding which it is in another Case of the like Circumstances formerly reported in this manner ; viz. A Testament is disproved in the Ecclesiastical Court : The party appeals to the *Metropolitan*, there it is disproved also ; afterwards an Appeal is made to the Court of Delegates, and there likewise it is disproved : At last the party appealed to the *Queen* in Chancery, by the Statute of 25 *H. 8.* and there also it was disproved before the Commissioners ; and whether the Queen *ex Autoritate sua Regali* might grant Letters of Administration, was the Question. The Opinion of the *Justices of the Common Pleas* was That the Queen might, because the said Court of Chancery is the highest Court, and the matter being once there, it cannot be determined by any inferior Court ; and then the party may shew in his Declaration generally the matter : And that Administration was granted to him by the Queen, *ex sua Regali Autoritate*, under the Seal of her Court of Delegates. (1)

(1) Mich. 24 Eliz.
in C. B. Godbolt.

In an *Assumpsit* brought by Husband and Wife, as Administrators of the Goods of *A. B.* The Defendant did imparl, and afterwards demanded Oyer of the Letters of Administration. And it appeared, that the Letters of Administration were granted to the Plaintiff by one *Tho. Taylor* Bachelor of Law, Commissary of the Bishop of *London*. The Defendant pleaded after the *Darrein* continuance, That Administration was granted to him under the Seal of the Vicar-General, and also pleaded the Statute of 37 *H. 8.* which says, that it shall be lawful for any person, being a Doctor of Law, to be Commissary, and exercise Ecclesiastical Jurisdiction ; and then shews, That the said *Thomas Taylor* was a
meer

meer Lay-man, and not *Doctor Legis Civilis nec Minister allocatus*, whereby he had no power to commit Administration: But it was adjudged by the whole Court, That the Administration granted to the Plaintiff, was a good Administration, being under the Seal of the Officer, until it be avoided by Sentence: And yet such an Avoidance shall not make a man's act void, no more than if a Lay-man be presented to a Benefice, albeit it be a Nullity in our Law; yet the Church shall not be void by our Law, but from the time of the Deprivation, of which notice ought to be given to the Patron: And if it should be otherwise in the principal Case, an infinite number of Administrations might be drawn into question upon such an Averment, That he who granted them was a Lay person: Which is not to be suffered, for the inconveniences which might happen. It was resolved, the pleading of the Administration to the Defendant was not good, because it appeareth by the date of it, it was after the last Continuance; and therefore could not be pleaded, until a new Continuance after. (2)

(2) Hill. 36 Eliz.
B R. Stoake's Case.
Popham. 37. Trin.
24 Eliz. B. Dorrel
vers. Collins. Cro.
Rep. par. 3.

An Exception was taken to a Declaration, because the Plaintiff conveyed his Interest to an Administrator, to whom the Archbishop of *Canterbury* did grant the Administration of all the Goods of the Lessee, and did not shew how the Archbishop granted it, either as Ordinary, or by his Prerogative: And this was held by all the Court a material Exception: But it was afterwards allowed. That all the Presidents in this Court; (*viz.* B.R.) and in C. B. were so in general, without special shewing how; and for that they would not change the Presidents, they disallowed the Exception. And in this Case it was held, That if an Administrator doth grant *Omnia bona & catalla sua*, a Term which he hath as Administrator, doth not pass, for it is not *suum*, but he hath it in right of the Intestate: But if one hath a Lease as Executor or Administrator of the Mannor of D. and he graneth all his right and interest in the Mannor, the Term which he hath as Executor, &c. doth pass; for he had no other right in it, and his intent is to pass it, but by general words it shall not pass.

Mich. 28, 29 Eliz.
Stamp vers.
Hutchins. Cio.
par. 3.

Debt against the Defendant as Administratrix, she pleaded *plene Administrevit*; the Jury found, That the intestate was indebted to divers by Obligations, and that after his death the Defendant had taken in the Obligations, and obliged her self to pay the greater part of the sums contained in the Obligations, at certain days to come, and for the residue had promised to the parties, That in consideration of delivery in of the Obligations, that she would pay, &c. And by the opinion of *Anderson*, *Windham* and *Periam*, it was held clearly a good Administration, for that the Property of the Goods of the Intestate to that value were altered and changed in the Defendant.

Action *Sur Trower* : And declares as Administrator of *J. S.* Mich. 29 & 30
and that Administration was committed to him by *A. B.* Official Eliz. Lacy verf.
to the Bishop of *Peterborough*, and sheweth not that he was Ordinary of the Place, or that the granting of Administration did belong Smith. Cro.
to him ; and this matter after Verdict was alledged in Arrest of par. 3.
Judgment ; but because divers Presidents had been so, and that such
Declarations had been allowed, the Court did give Judgment for the
Plaintiff.

Debt as Administrator to one *Philips*, and declares, That Administration of the Goods of *Philips* was committed to him *per* Mich. 36 & 37
Adrian Vane Sacrae Theologiae Doctorem, such a day *apud Mon-* Eliz. Morgan
mouth, and the Plaintiff recovered in the Common Bench by default verf. Williams.
; and Writ of Error was thereon brought, and the Error assign'd, because it is not shewn that *Vane* was Ordinary of *Mon-* Cro. par. 3.
mouth, nor that the committing of Administration appertained to
him ; and in regard it was in a Declaration which ought to be cer-
tain, and he is not a Bishop, nor any person who may be intended
to be the Ordinary, the Judgment was therefore reversed.

It was moved by *Coke* the Queens Attorney, That the committing of Administration being by the Archbishop, although he Hill. 37 Eliz.
had not Goods in divers Diocesses, because it is in his Province Cam. Scac.
wherein he hath Jurisdiction, it is not void, but only voidable by Bingham verf.
Sentence ; and it is not like to an Administration committed by Smeathwick.
another Bishop of the Goods of a man who died in another Dio- Cro. par. 3.
cess, or who had Goods in divers Diocesses ; and this difference
hath been taken and agreed in the Queens Bench, &c. But the
Justices said, it was all one, and the Administration is void in both
Cases, and not voidable only.

Debt upon an Obligation of One hundred pound, one of the Mic. 43 Eliz. C.
Defendants was Out-lawed, the other pleaded, that he who was B. Godfrey verf.
Out-lawed, was made Executor, and solely proved the Will, and Woodward.
Administred, and that the Defendant as Servant unto him took Cro. Rep par. 3.
divers of the Testators Goods by his Delivery, and by his appoint-
ment had sold them, *Absque hoc* that he Administred as Executor,
or in any other manner ; and it was thereupon demurr'd, and ad-
judged to be an ill Plea, because he doth not say that he refused
before the Ordinary, nor confesseth any Administration ; for that
which he confesseth is not any Administration, and so no
answer to the Plaintiff : Wherefore it was adjudged for the
Plaintiff.

Debt : The Plaintiff as Administrator of *J. S.* sued upon an Hill. 3 Jac. B. R.
Obligation made by the Defendant, and had Judgment, after- Barnhuft and
wards the Administration is revoked ; but notwithstanding that, Sir Charles Yel-
the Plaintiff proceeded, and got the Defendant in Execution, vertons Case,
And upon a motion to the Court, it was agreed by the whole Yelv. Rep.

Court, That the Execution was void, and that the Defendant ought to be discharged, *Quia Erronice emanavit*; for that the Letters of Administration being revoked, the Plaintiffs power is determined; therefore the ground of his Suit being overthrown, *viz.* his Commission, he hath no Authority to proceed further, and the Execution issued without Warrant. The same Law (*per Curiam*) on a Judgment for an Administrator, the second Administrator shall not have Execution thereon, for he is not privy to the Record. *Quod Nota.* And therefore if the Administrator of *A. B.* sue, and have Judgment for a Debt due to *A. B.* and then die, the Administrator of the Goods not Administred of *A. B.* may not have a *Scire facias* upon this Judgment, but must commence the Suit *de Novo.* (1)

(1) Cro 2.4.
More.Case 882.

Mich 41, & 42
Eliz.C.B. Tem-
ple verf. Tem-
ple. Cro. Rep.
par.3.

Debt. The Case was, Rent was granted to *Baron* and *Feme* for their lives, the Rent was Arrear, the *Baron* dies, another Rent is Arrear, the *Feme* dies Intestate, and her Administrator brings Debt for the Arrearages due in the life of the *Baron*, and after. All the Court resolved that it well lay, because the Arrearages survived to the *Feme*, as well as the Rent it self. But an Exception was taken to the Declaration; for that it is alledged, that Administration was committed by the Dean of *Lichfield*, and it shews not by what authority he committed it, nor that he was *Loci illius Ordinarius*; and for this cause the Court held the Declaration to be ill, for the Court intends not his Authority, being special, without shewing it. But the pleading of Administration committed by a Bishop is good enough, without saying that he was *Loci illius Ordinarius*, for so it shall be intended, and so the Presidents warrant it; but in a Bar of Replication it is vicious. *vid.* 35 *H.6.* 46.

Mich: 17 Jac.
B.R. Chiverton
verf. Trudgeon.
Co Rep p1r.2.
Pl. 20.

Debt brought against *C.* as Administrator, and Judgment thereupon; and now moved in Arrest thereof, That this Action was brought by an Administrator, who shews, That Administration was committed to him by the Archdeacon, but shews not what authority the Archdeacon had to commit Administration; and in proof thereof, 21 *H.6.* 23. and 35 *H.6.* 46. were cited. And the difference is where Administration is committed by the Bishop or Metropolitan, and where by one who hath a peculiar Jurisdiction; for in the last Case he ought to shew how he hath his power, *Plowd.* 297. And although it be after Verdict, yet it is not holpen by the Statute of 18 *Eliz.* cap. 14. being matter of substance and not of form, as it was adjudged in *Cutts* and *Bennets* Case; but the Court held, that it was well enough; and they said, That the Books are of Peculiars, for it cannot be intended, that they have any authority unless it be shewn: But the Archdeacon is *Oculus Episcopi*: And *de Jure Ordinario* he is to commit Administration: and it was adjudged for the Plaintiff.

An Executor recovers Debt, and dies Intestate: The Ordinary commits Administration *de bonis non, &c.* The Administrator shall not have a *Scire facias* on the Judgment, but a new Action of Debt as Administrator to the first Testator, who is now dead Intestate. And when an Executor is made only from a day to come, the Administration in the mean time must be granted according to the Statute- (1)

A man lets a Lease for years, the Lessee Covenants for him and his Assigns, that he will not lop nor top the Trees during the Term: And after the Lessee dies Intestate, and the Ordinary committed Administration to *J. B.* who lopp'd the Trees; whereupon the Opinion of the Court was, That it was a breach of the Covenant, for that an Administrator is an Assignee as well as an Executor. And an Administrator may as well as an Executor, plead Detainer for his own Debt, specially, without being driven to plead *Pleinement Administer*: As in *Sir Hen. V. Varners Case* against *V. Vainsford*; against whom, as Administrator to *Kirby*, he brought Debt: The Administrator pleaded, That the intestate was indebted unto himself, by divers Obligations (and recites them) to the sum of 80*l.* and that Goods to that value, and not above, came to his hands, which he detains for his Debt, and that he hath nothing *Ultra*. The Plaintiff demurred in Law, because it amounted to the General Issue of *Pleinement Administer*. But the better Opinion of the Court was, That this is no cause of Demurrer, for the Plea is sufficient, and besides it is some matter in Law, which hath been allowed always to be pleaded specially, and not left to a Jury.

Administrator brought Debt, and declared, that Administration was committed to him by *A. B. Sacre Theologiae Professorem*, and saith not *Loci illius Ordinarium*; for which cause upon Errour the Judgment was reversed.

In this Case the Question was, Whether the Ordinary had power to take a Bond or Obligation of the Administrator to distribute, according to the Ordinaries discretion, the Goods that should remain after Debts and Legacies paid. And it seemed to the Court That such Obligation is not good: But in regard the Case was of great consequence, *Adjournatur*.

Debt brought by *J. S.* against *A. P.* Executor of *H. VV.* upon a Bond or Obligation of One hundred Marks: The Defendant pleaded, he was never Executor, nor Administred as Executor; whereupon they were at Issue, and at *Nisi Prius* it was found by a special Verdict, That he had received Seven pound Debt due to the Testator, and made an Acquittance for the same, and took into his possession several particular parcels of Goods of the Testators, and converted them to his own use: Whereupon all the Ju-

Hill. 28 H. 8.
Levet. vers.
Lewkenor. Mo.
Rep. nu. 13.

(1) Hob. 150.
Mich. 5 Eliz.
Mo. Rep. 136.

Trin. 13 Jac.
Rol. 1906. Sir
H. Warner vers.
Wainsford.
Cro.

Mich. 26 & 37
Eliz. Morgan
vers. Williams.
Mo. Rep. r. r.
504.

Hill. 13 Jac.
Slawny vers.
Elbridge. Mo.
Rep. nu. 1191.

Mich. 5, 6 Ph.
& Ma. Stokes
vers. Porter. Mo.
Rep. nu. 53.

Justices resolved, That it was an Administration ; but at the request of Sir *Anthony Brown* they respited the Judgment ; after the Defendant died, and it repented the Justices that they had not given Judgment.

34 H.6.14.
Roll. Abr. tit.
Exec. lit. D.

The Ordinary may grant several Administrations of several parts of the Intestate's Goods, 10 E.4.1. b. 18 H.6.22. b. 38 Ed. 3.21. Also he may grant the Administration conditionally, as whereas it was before granted to *J.S.* who is now Out-lawed, or a Prisoner, or beyond Sea, &c. he may grant it to another with an *Ita tamen*, That if the said *J.S.* return into *England*, he shall Administer when he returns.

20 Ed.4. 17
Roll. Abr. tit.
cod. lit. R.
Roll. ibid. 11 H.
4.84.

If an Executor takes only the Goods which the Testator in his life-time took from him *per tort*, it is not an Administration.

If certain Goods be devised to a Co-Executor, and he take them without the assent of the other Co-Executor, it is an Administration, because a Devisee cannot take the Goods devised without the Executor's assent. But where the Testator's Executor or Administrator hath once agreed to a Legacy, so as it is executed, the Legatee hath then such a property therein, and so vested in him, that he may enter into, or take the thing, and justify the same. And therefore if an Executor or Administrator assent, that the Devisee of a Term shall occupy the Land, this is a good assent to perfect the Devise of the Lease. And if part of the Lease be devised to one, the remaining part to another ; and the Executor assent, that the first Legatee shall receive his part, this may be a good assent to the other for his part. But if a Term be devised to one, and a Common or a Rent out of it to another and the Executor pay the Rent, or suffer the other to put in Cattel into the Common : This

(1) Bridgm. 55. is no assent to the Term. (1)

(2) Mich. 13 Jac.
B.R. Goffe vers.
Haywood. Entr.
Trin. 12 Jac.
Rot. 83 2. Rol.
Rep.

A man devises a Rent to one, and the Term to another, the Executor's assent to the Term is not an assent to the Rent, nor can he assent to it afterwards : But if he first assent to the Rent, he may afterwards assent to the Term. (2)

A Term of years of Land is devised to one, if the Executor suffer the Devisee to take the profits thereof, though but for a certain time only ; or says to him, *I wish you much joy of it*, or *I purpose you shall have it*, according to the Devise, or the like, this will amount to an assent in the Executor, and be an Execution of the Devise. (3)

(3) Co. 4.18.

If a Devisee shall enter into a Term of years, or take any Goods or Chattels devised to him by Will, without the delivery thereof by the Executor, he may have his Action of Trespass against him for so doing. (4) The Case is the same, be the thing devised certain or uncertain. (5)

(4) 2 H. 6.16.
11 H.4.84.
Bridgm. 55.
7 H.6.35.
(5) Dyer 254.

A Term of years is devised to *A. B.* the Executors agree, that *A. B.* and *C. D.* shall have it: This is good *assent*, and by this *A. B.* alone shall have it. (6) (6) *Cs.* 4-29.

If Land which a Testator hath by Lease, be devised by him to his Executors for life, the Remainder over, there must be a special assent thereunto by the Executors, as to a Legacy; otherwise it is not executed: For where a Devise is to an Executor for life, and he enter generally, he shall be deemed to have it as an Executor, and not as a Legatary, unless he makes a special Election. (7) (7) *Co.* 1047.

A Term is Devised by a man to his Wife for as many years as she shall live, and after her the residue thereof he doth devise to his Son, he makes his Wife his Executrix, leaves Assets to pay his Debts, and dies. The Wife enters, and claims only as Legatee for her life. This is a good assent in Law to the Devise of the Remainder-Estate to the Son, and doth vest, not as a Possibility, but as an Interest. (8) (8) *Dyer* 356. *Plow.* 516.

Although the assent of an Executor be so requisite in the Law to the due Execution of a Legacy, yet it is not of that force as to make that Legacy good, which in it self is bad; and therefore if a Testator devise a thing which he hath not to his own use, nor hath a property therein, such Devise cannot be made good by the Executors assent thereunto. (9) Nor is the Executor's assent requisite to a Devise of Land; for without any leave of the Executor, a Devisee of the Fee-simple, Fee-tail, for life or years, may enter into the Land devised: Inasmuch, that if the Heir enter first, the Devisee may enter upon him, and eject him. (10) And if a Legacy be bequeathed to one of the Executors themselves, he may take it without any assent of his Co-Executors, yea, before any Administration if he please. (11) (9) *Plow.* 525, 526. (10) *Co.* on *Lin.* 111. *Perk.* Sect. 576, 578. *Brownl.* 1. 132. (11) *Perk.* Sect. 572. *Bridgm.* 55.

The assent of any one Executor, where there be more, is sufficient, and so is the assent of an Executors Executor, as also is the assent of an Intestate-Executor's Administrator: Or if there be no such, the Legatee himself upon an Executor's Intestation or Refusal of Administration, may take the same, and assent to his own Legacy by publick Declaration. And where the same person is both Executor and Legatee, he may assent to, and take the one, yet wave the other. For which Reason, if an Executor-Legatee of a Term enter, and die before Probate, the Legatees Executor shall have it, provided it be not in prejudice to a Creditor. (12.) (12) *Dyer* 372. 367.

If Lease-Lands be devised to an Executor for life, the Remainder over, in this Case there must be a Special assent to it, as to a Legacy to him in Remainder, otherwise it will not be well executed. (13) (13) *Cro.* 1. 213. *Roll.* *ibid.* tit. *Execut.* lit. E.

Administration may be committed of the Goods of a Woman, Covert, who dies Intestate; for possibly she might have things in Action,

Action, which by the Law are not given to her Husband, nor after her decease are at all invested in him. 8 Eliz. 25. 90. *Admitt.*

Hill. 36 H. 8.
Bendlowes 25.
& Hugh's A.
bridg. vol. 3.
cit. Administ.

A man possessed of Goods, made an Infant his Executor, and died: The Ordinary committed Administration *durante minori etate* of the Infant, to a stranger: The Question was, when the Infant came of full age, What remedy he should have against the Administrator for the Goods? It was the Opinion of the Justices, That he should not have an Account against him, but he might have *Detinue* against him for the Goods, or otherwise sue him in the Ecclesiastical Court for them.

Trin. 30 Eliz. B.
R. Subbs, &
Rightwife Case.
Cro. 3. par. 92.
& Hughes Ibid.

Debt against an Executor: The Defendant pleaded, That he had taken Letters of Administration: The Plaintiff replied, That he Administred of his own wrong, and after took Letters of Administration. It was the Opinion of the Justices, That by his own act he cannot purge himself of the first wrong; and therefore this Action by the name of *Executor*, good.

Paſch. 30 Eliz.
B R Hewson &
Webbs Case

Note, it was resolved *per Curiam*, that Debt upon a Contract of the Intestate doth not lie against an Administrator.

Cro. 3. par. 121.
Mich. 43. 44
Eliz. B. R.
Scudmore. verſ.
Winston. Cro.
Rep. Par. 3.

Debt by an Administrator. After Verdict it was moved in Arrest of Judgment, That the Declaration was not good, because he counts, that Administration was committed to him by the Bishop of St. David's, and he saith not *Loci illius Ordinarius*, nor *cui Administratio pertinuit, sed non allocatur*. For it is intended that he is the Ordinary, and so is the common course of Declarations, unless the Administration is alledged to be committed by one who hath a peculiar Jurisdiction.

Vid. 21 H. 6. 29.
21 Ed. 4. 50.
Vid. Co. 8. part.
21. Acc.

The Commissary of the Bishop of London committed the Administration of Goods by word, and gave an Oath to the Administrator, which was entred in the acts of the Commissary; but there was no Letters of Administration, either in the name of the Commissary or Ordinary; and whether this was a good Administration granted by word, was the Question? It was not resolved, but the better Opinion seemed to be, that it was not. It cannot be without Deed.

If divers persons be made Executors, and some of them refuse at one time, and some of them at another, before the Ordinary, they may afterwards Administer the Goods of the Testator; but if they all refuse before the Ordinary, and the Ordinary commits the Administration of the Goods to another, afterwards they cannot prove the Will.

Goke 9. part.
39. Henſloes
Case.

A Merchant of Ireland, by an Obligation made in Ireland, became bound to A. B. of London; which Bond was in London, and there remained. A. B. died Intestate in Com. B. in England. The Bishop of Ireland committed Administration to the Son of A. B.

A. B. who released the Debt. The Archbishop of Canterbury committed the Administration to the Wife of *A. B.* and she brought an Action of Debt against the Obligor; and adjudged the Action was maintainable; for that the Administration shall be committed by the Ordinary of the place where the Obligation is, and not where the Debt first did arise, because it is not Local.

14 Eliz. Dyer
303. Lukener's
Case.

C H A P. XXXI.

Of Administrations fraudulent and revocable.

1. *The Statute of 34 Eliz. cap. 8. Touching fraudulent Administrations.*
2. *Whether the Husband may claim the Administration of his Intestates Wifes Estate de Jure, before or in precedency to any other.*
3. *In what case an Executor ought to prove the Will, notwithstanding Letters of Administration granted to another.*
4. *Letters of Administration once granted, are not revocable at the Ordinaries meer will and pleasure.*
5. *In what case Acts done by a former Administrator are good in Law, notwithstanding second Letters of Administration afterwards granted.*
6. *Cases in Law touching this Subject.*
7. *Whether an Alien may be an Administrator.*

1. **T**HE granting of Administrations by the Ordinary, or such as by or under him are thereunto constituted, being the only Expedient (Letters *ad Colligendum* excepted) that the Law hath provided for the due management and disposal of the Goods and Chattels of such deceased as die Intestate, or eventually so: And the Ordinary's power therein, though in some things circumscrib'd with Limitations, yet in other things left even by the Law much to his discretion: There have not been wanting very subtil Experiments upon the decease of Intestates, by an Artifice even under colour of Law it self, to arrive at a Legal title, to such Goods and Chattels, with design thereby so to possess the Estate, as to dispossess the Intestate's Creditors of all fair hopes of recovering their just Debts. Now for prevention of such Frauds, and to obviate the consequential Mischiefs thereof, the Law hath provided; as followeth, *viz.* "Forasmuch as it is often put in ure, cap. 8.

Stat. 43 Eliz.

to

“ to the defrauding of Creditors, that such persons as are to have
 “ the Administration of the Goods of others dying Intestate com-
 “ mitted to them if they require it, will not accept the same, but
 “ suffer or procure the Administration to be granted to some stran-
 “ ger of mean Estate, and not of Kin to the Intestate, from whom
 “ themselves or others by their means do take Deeds of Gifts, and
 “ Authorities by Letters of Attorney, whereby they obtain the
 “ Estate of the Intestate into their hands, and yet stand not subject
 “ to pay the Debts owing by the said Intestate; and so the Credi-
 “ tors for lack of knowledge of the place of Habitation of the Ad-
 “ ministrator, cannot arrest him, or sue him: And if they fortune
 “ to find him out, yet for lack of ability in him to satisfie of his
 “ own Goods, the value of that he hath conveyed away of the In-
 “ testates Goods, or released of his Debts by way of Wasting, the
 “ Creditors cannot have or recover their just and due Debts. Be
 “ it Enacted, That every person and persons that shall hereafter
 “ obtain, receive and have any Goods or Debts of any person In-
 “ testate, or a Release, or other discharge of any Debt or Duty that
 “ belonged to the Intestate upon any fraud as aforesaid, or with-
 “ out such valuable Consideration as shall amount to the value of
 “ the same Goods or Debts, or near thereabouts (except it be in
 “ or towards satisfaction of some just and principal Debt of the
 “ value of the same Goods or Debts to him owing by the Intestate
 “ at the time of his decease) shall be charged and chargeable as
 “ Executor of his own wrong, and so far only as all such Goods
 “ and Debts coming to his hands, or whereof he is released or
 “ discharged by such Administrator, will satisfie, deducting never-
 “ theless to and for himself allowance of all just, due, and prin-
 “ cipal Debts upon good Consideration, without Fraud, owing to
 “ him by the Intestate at the time of his decease, and all other pay-
 “ ments made by him, which lawful Executors or Administrators
 “ may and ought to have and pay by the Laws and Statutes of
 “ this Realm.

Hill. 3 Car. in
 the Delegates
 Johns vers.
 Rowe. Cro. Rep.

2. Before the Delegates in an Appeal of Administration com-
 mitted to *A. B.* Niece of *E. J.* late the Wife of *R. J.* The Hus-
 band appealed, pretending that of right it belonged to him, and
 not to any of his Wives Kindred: And after divers Debates, as
 well by Common Lawyers as Civilians, it was resolved by *Jones*,
Whitlock and *Yelverton* Justices, That of right the Administra-
 tion ought to be committed to the Husband, and not to any of
 the Wives Kindred, by the Statute of 31 *Edw. 3. cap. 11.* as to the
 most faithful Friend; for as it belongeth unto the Wife upon the
 Husbonds dying Intestate, so it belongeth more properly unto the
 Husband upon the Wives dying Intestate: But they agreed, That
 the Statute of 21 *H. 8.* doth not extend to compel the Husband to take

take Administration, for that is a Penal Law, and extends only to the Wife and Kindred, and not by Equity to be extended to the Husband; and for their opinion they relied upon *Coke*, lib. 4. fo. 51. *Oguel's Case*, That the Administration of the Goods of the Wife belongeth in right to the Husband. But *Croke* Justice doubted thereof, and was of a contrary Opinion: For the said Book doth not give any Reason, nor shew any Authority to maintain it, and in Reason the Husband is not to have it *de Jure*, but it is in the power of the Ordinary to commit the Administration unto him, or to the Wife's Kindred; for if he ought to have it *de Jure*, he would never suffer the Wife to make any Will for the Advancement of the Children by another Husband, or for her Kindred: And the Wife, without the Husband's assent, cannot make a Testament; but by his assent she may make him Executor for things in Action; as Debts, or *des biens asport* before the Coverture: So it is his default if she dies Intestate. Also the Wife is to be intended to be advanced by the Husband, and to have by the Custom *rationabilem partem bonorum*; therefore he is not in such degree as his Wife, and he is not *de Jure* to have the Administration; but the Ordinary may commit it unto him if he please, or he may refuse, and no Appeal lies, if the Administration be not committed unto him: For it is merely at the Ordinaries discretion, and of this opinion were the Civilians: But afterwards the said three Justices, in the absence of *Croke* Justice, resolved for the Plaintiff. *Vid.* 4 H. 6. 31. 12 H. 7. 24. *Coke*, lib. 9. fo. 38. 34 H. 6. 14. 27 H. 8. 26. 39 H. 6. 27. 18 Ed. 4. 11.

3. Although upon an Executors refusal to prove the Will and take on him the Office of Executorship, and thereupon Administration be committed, the Executor cannot (as some hold, *sed Quære*) go back again to prove the Will, and assume the Executorship; (a) yet if only upon the Executors making default to come in upon Process to prove the Will, the Administration be committed; in that Case the Executor may yet at any time after appear and prove the Will, and so cause the Administration to be revoked. (b) Also, if after an Executor's refusal it shall appear to the Ordinary that he had Administred before such his refusal, then may the Ordinary revoke such Administration granted to another upon such refusal, and compel the refusing Executor to prove the Will; for that by so Administring precedent to his refusal, he hath accepted and determined his Election, and therefore cannot be admitted to accept and refuse also; so that in this Case also the Administration may be revoked.

4. Some have been of Opinion, That the Ordinary after he hath granted Letters of Administration, may yet afterwards even without cause shewed, and at his meer pleasure revoke the same, and

(a) Offic. Exec.
p. 60.

(b) Mich. 27, 28
Eliz. inter Bale
& Baxter.

(c) 4 H. 7. 14.
Lirtl. Bro. Sect.
330. 34 H. 6. 14.
Dyer 339. Bro.
Adminit. 7.

It hath been
adjudged per
Curiam that
where the Or-
dinary hath
granted Letters
of Administra-
tion to one who
ought to have
them, that in
such Case, they
ought not to
be revoked by
the Ordinary.
Pasch. 23 Car.
in B. R. Betef-
worth's Case.
Styles 10.

(d) 21 H. 8. 5.
Coke 6. 13.
New B. of En-
ties 33. Plowd.
251. Coke 6. 14.
Dyer 339.

(e) Brownl. Rep.
2. part 83.
Coke 3. 185.
Plowd. 281.
9 H. 5. 5.

grant it to another; yea, that if the Ordinary grant Letters of Administration to one, and then again afterwards grant Administration of the same Goods to another, that hereby the first Letters of Administration be vacated and revoked, albeit there be no express words of Revocation, contained in the latter. (c) But indeed the Law seems far otherwise, and that the Ordinary, after he hath granted, according to the Statutes in that behalf provided, the said Administration, cannot afterwards, at his pleasure, revoke it, and grant the same to another without cause, that is, unless the first Administration were illegally granted, or where the first Administrator either cannot or will not Administer, or the like.

5. Where there is a former Administration regularly granted, all Acts lawfully executed by the first Administrator as Administrator, are good in Law; and shall bind the next and succeeding Administrators. For this Reason it is, that if Administration be granted to a stranger, and the next of Kin sue to have it revoked, and the first Administrator (*pendente lite*) during the Suit sell the Goods on purpose to defeat the second Administrator, and then the first Administration happens to be revoked, and the Administration to be committed to another: In this Case the second Administrator cannot recover these Goods, or have any remedy, unless the first Suit for granting the Administration were by Appeal annulled: In which Case, all that the first Administrator did was void, and the second Administrator in such Case may recover all the Goods the first Administrator sold. Again, if the first Administration be conditionally granted, all the acts which the Administrator doth before the breach of the Condition, are good; so that the subsequent Administrator cannot avoid any gifts or sales before such breach made by the said former conditional Administrator. (d) But suppose the Bishop of a Diocese doth, as he ought, grant Letters of Administration of the Goods of an Intestate, not having *Bona Notabilia* to one: And the Archbishop grant Letters of Administration of the same Goods to another: In this Case, the effect of the first Administration is suspended until the other be repealed by Sentence. And if there be a Will concealed, and thereupon Administration is granted, after which it happens that the will is produced and proved: In this Case, the Administration is determined, and all acts vacated, which had been formerly done by such a surreptitious Administrator. (e)

6. In Trover and Conversion: The Case was, A man died Intestate, and the Ordinary committed Administration to a stranger; and afterwards the next of Kin of the Intestate sued a Citation in the Ecclesiastical Court to have it repealed; and *pendente lite* the Administrator sold the Goods of the deceased, to defeat the Plaintiff, and afterwards the Letters of Administration were re-
voked

voked by Sentence, and the first Sentence annulled and made void, and new Administration granted to the Plaintiff. In this Case it was resolved, that the Action did not lie; and here the difference was holden between a Suit by Citation, for to countermand or revoke the former Administration, and an Appeal, which is always a reversing of a former Sentence; for an Appeal doth suspend the former Sentence, otherwise of a Citation: And in this Case, because the first Administrator had the absolute property of the Goods in him, he might sell them to whom he would; and although the Administration be afterwards revoked, the same shall not make void the Sale: (f) But if such sale had been by Covin, it had been void against Creditors by the Statute of 13 Eliz. And in an Action of Debt brought against an Administrator, it was the opinion of all the Justices, That an Administrator might retain monies of the Intestates in his own hands, to satisfy a Debt due from him to himself: But an Executor in his own wrong should not so retain to satisfy his own Debt. (1) And where an Administratrix (*durante Minori etate* of an Executrix) made divers Obligations to the Testators Creditors, and afterwards took Husband: The Opinion of the Court was, That he might retain as his own so much of the Testators Goods, as amounted to the value of the Debts paid and undertaken, by virtue of the Obligations given to the said Creditors. (2)

Letters of Administration were granted to J.S. and he released all Actions; and afterwards the Administration was revoked, and declared to be null and void by Sentence. It was adjudged, that in that Case the release was void. (g)

An Administration may be granted upon Condition; and such an Administration, if the Condition be not performed, may be revoked: But if such an Administrator, before the Condition be broken, giveth away the Goods; yet such a Gift is good. (h)

It was agreed by the Court in *Carew's Case*, That if the Bishop commit Administration, he may revoke the same without any Sentence of Revocation to be given in any Ecclesiastical Court, or elsewhere.

It was adjudged, That if a Metropolitan grant Administration where the Intestate hath not *Bona Notabilia* in divers Dioceses, it is voidable, not void. But 19 Eliz. it was clearly held, That if a Bishop of a Diocese grant Administration which appertains to the Metropolitan, it is void.

Two Executors were in Suit which of them was the true Executor, the Ordinary (depending the Suit) granted Administration: It seemed to the Court that he could not so do.

7, Sir Upwell Carcon, an Alien born, and not made Denizen (being Agent here for the States of *Holland*) died Intestate.

(f) 17 Eliz in B. R. Co. 6 part. 28. Packman's Case.

(1) Mich. 11 Jac. C.B. Bond & Green's Case. Goob. 216. void Copart 5. Coulter's Case.

(2) Mich 15 Jac. C.B. Briers & Goddard's Case. Hob. 250.

(g) Mich. 9 Jac. Rot. 2304 in C. B. Throgmorton & Hobby's Case Brownl 1. part. 51.

(h) Co. 6 part. 19. in Packman's Case.

Mich. 35, 36 Eliz Arderf. Rep. 313. Case.

Hill. 22. Eliz. B. R. inter Veere & Jeffer. Mo. Rep nu. 288.

Trin. 43 Eliz. C. B. Robyn's Case Mo. 874.

Pasch. 1 Car. C.
B. Sir Upwel
Caroon's Case
Cro. Rep.

The Contest was, to whom Administration should be committed. For the Judge of the Prerogative offered to commit it unto three of his Brothers and Sisters Children, who were Aliens born, and lived in the Arch-Dutcheffes Countrey. But one who was Grand-child of his Sister, born in *England*, and inhabiting here, endeavouring to obtain it, moved, That of right it appertained unto him, being a Denizen; because the Estate consisted in Leases for years of Lands, and personal Estates in Debts, and that Aliens may not have Leases for years, although they may have personal things, and therefore prayed a Prohibition: For by the Statutes of 31 *Edw. 3.* & 21 *H. 8.* Administration ought to be granted *aux loyal homes*; and Aliens cannot thereby be intented, which are not inhabiting or commorant here. *Sed Curia advisare vult.* Afterwards in *Michaelmas* Term, being again moved, it was resolved by the whole Court, That no Prohibition was grantable; for an Alien may be Administrator, and have Administration of Leases, as well as of personal things, because he hath them as an Executor in anothers right, and not to his own use. And he may be Administrator as well as a person Out-lawed or Attainted may be an Executor. And this Court hath no authority about committing of Administrations, &c. *Pasch. 41 Eliz. Rot. 1704. Beck. verl. Philips.* Debt brought by an Administrator: The Defendant pleads, the Plaintiff was an Alien, adjudged, *Quod respondera ouster.*

C H A P. XXXII.

Of Filial Portions.

1. *The Pretorian Law in point of Succession.*
2. *Whether the Ordinary may compel the Administrator to give Filial Portions.*
3. *What provision of Law now in force, as to distributions of Intestates Estates.*

1. **A**N Administration of a deceased's Goods and Chattels doth not proceed by or out of the Civil Law, properly so called, which only makes Heirs, and giveth right of Succession, but out of the *Pretorian Law*, or Law of Conscience; which in Equity calleth sundry to the Succession of other mens Goods by Administration, where there is no Will; and in some Cases, where there is a Will, as where the Will is concealed, or the Executor renounceth the Will: But if the Will once appear, then the Administration ceaseth. In Cases where Administrations are to be granted, the Children of the deceased had liberty by this Law to take it within a year after the death of the deceased; and if they were further off of Kin, then they had only a hundred days to take it in, unless those who were to take it were Infants, Mad, Deaf, Dumb, or Blind: In which Cases, there was a longer time assigned. By this Law the *Prætor* granted Administration, not only according to the Tables of the Testament, but many times even against the Tables of the Testament: As, where a Child was not disinherited in his Father's Will, by and in plain and express terms, but passed over with silence only; or that the Child was not born at the time of his death, and so not certainly known whether any such Child were living or not, or whether to be hoped for: In which Case, if it did after appear, then was the Mother by that Law to be put into possession of that which was the Child's part. If there appear no Will, then was the Administration by this Law committed in this order or method. First, the Children of the deceased were admitted. Secondly, those that were next of Kin by the Male-Line. Thirdly, those that were next of Kin in the Female-Line; which difference notwithstanding between Male and Female at this day is taken away, and they that are next of Kin, are equally admitted of either Sex. Lastly, came those which had right thereto, in that they were Man or Wife. (a)

2. It hath been and still is much controverted, Whether the Ordinary hath power to compel the Administrator to give Portions

(a) Ridley's
view of the Civil and Ecclesiastical Laws.
Sect. 8. cap. 1.
par. 1.

(b) Cok. 8. 135
 9. 39. Dyer
 255. Westm. 2.
 c. 20. & 31 Ed. 3.
 c. 11. vid. Cro.
 p. 45.
 (c) Hill. 13 Jac.
 Coke B. Hen-
 slow's Case.
 & Trin. 3 Jac.
 Coke B. in Da-
 vy's Case. &
 Hil 2 Car. 1.
 Co 9. in Fother-
 ley's Case.
 (1) ff. de agnos-
 cend. & alend.
 lib. vel parent.
 & ff. de ventre
 inspici. & c. ff. de
 offic. Consul. l.
 ne quicquam. ff.
 de plano.
 (2) C. de Secun-
 dis Nuptiis. tot.
 tit.

(d) 22 & 23
 Car. 2.

to Children, or to allot and distribute Filial Portions to the deceased's Children out of his Estate: If the Ordinary attempt this, either before or after the granting of Letters of Administration, it is held by some, that the Administrator may have a Prohibition against the Ordinary, (b) and divers have been granted accordingly; yet notwithstanding this, it is usual for the Ordinary to order and allot distributions of Filial Portions, and therein Prohibitions not often granted at this day. (c) For till of late there hath not been any positive Law of the Land, for the Settlement and certain Allotment of the Goods of an Intestate, by way of Distribution: Indeed by the Civil Law, special provision is made therein; inasmuch, that neither the Woman surviving her Husband, nor the Man surviving the Wife, having Issue between them during the inter-marriage, shall have the property of these Goods, which either of them brought one to another, and are left behind by the deceased, but the property shall belong to the Children of the deceased, and only the use or occupation thereof to him or her who doth survive, for and during his or her natural life: (2) For which end, if the Husband or Wife doth re-marry, that Law requires, That he who marries the Widow, shall be obliged with sufficient Sureties, for the due Restitution of the deceased's part, unto the Children of the former Marriage. And now also with us, provision is made touching the Distribution of the Goods of persons dying Intestate: Indeed the Controversie touching the Ordinaries power of Compulsion, as to an Administrator, in reference to a Distribution of Filial Portions, was not long since considerable.

3. But now this Question is fully resolved, and the Controversie at an end; for by a late Statute, (d) it is enacted, 'That the Ordinaries shall call Administrators to Account, for and touching the Goods of any person dying Intestate, and order and make just and equal Distribution of what remaineth clear (after all Debts, Funerals and just Expences first allowed and deducted) amongst the Wife and Children, or Childrens Children, if any such be, or otherwise to the next of Kindred to the dead person in equal degree, or legally representing their Stocks *pro suo cuique jure*, according to the Laws in such Cases, and in manner and form following; that is to say, One third part of the said Surplusage to the Wife of the Intestate, and all the residue by equal portions to and amongst the Children of such persons dying Intestate, and such persons as legally represent such Children, in case any of the said Children be then dead, other than such Child or Children (not being Heir at Law) who shall have any Estate by the Settlement of the Intestate, or shall be advanced by the Intestate in his life-time, by portion or portions

‘ tions equal to the share which shall by such Distribution be allotted to the other Children to whom such Distribution is to be made, &c. And the Heir at Law, notwithstanding any Land that he shall have by descent or otherwise from the Intestate, is to have an equal part in the Distribution with the rest of the Children, &c. And in Case there be no Children, nor any legal Representatives of them, then one moiety of the said Estate to be allotted to the Wife of the Intestate, the residue of the said Estate to be distributed equally to every of the next of Kindred of the Intestate who are in equal degree, and those who legally represent them. Provided, that there be no Representations admitted among Collaterals, after Brothers and Sisters Children : And in Case there be no Wife, then all the said Estate to be distributed equally to and amongst the Children, &c. And no such Distribution to be made till after one year after the Intestates death; nor without sufficient Security to be given by those to whom such Distribution shall be made for refunding back to the Administrator (according to each ones ratable proportion) in case of the Intestates Debts afterwards sued for and recovered, or otherwise duly made to appear : For other Proviso’s, Rules and Limitations in the said Late Act of Parliament, the Reader is referred to the Statute it self, there more at large.

A man dying Intestate, there hapned a Controversie between his Widow and one of the next of Kin touching the Administration of his Goods. It was agreed, the Widow should have the Administration, and should enter Bond in the Prerogative Office, to make an equal Distribution of the Goods of the Intestate amongst the Kindred ; and she entred Bond accordingly, and had Administration ; and afterwards the Bond was sued against her in the Spiritual Court. It was said, That in regard the Administration was granted to one to whom the Ordinary was not bound to grant it, that such a Bond taken for equal Distribution, was good. But it was resolved, That the taking of the Bond was not lawful; for when the Ordinary hath once committed the Administration to the party, his power is determined ; and he cannot grant Letters of Administration upon a Condition : And in the principal Case, a Prohibition was granted to stay the proceedings upon the Bond in the Spiritual Court. (e)

(e) Pasch. 1653.
R. B. Davies &
Matthew’s case.
Styles 456.

Whereas in the said Case it is reported, That among other things it was resolved, That the Ordinary cannot grant Letters of Administration upon a Condition ; yet in *Packman’s Case* it is reported, That an Administration may be granted upon Condition; and such an Administration, if the Condition be not performed, may be revoked or repealed : But if such an Administrator, before the Condition be broken, giveth away the Goods, yet such a Gift is good. (f)

(f) Co. 6. part.
19. in Pack-
man’s case.

Note,

(e) Mich. 15 Jac.
in C.B. Tooker
& Loanes case.
Hob. 190. Vid.
Styles. Pasch.
24. B.R. Hill.
& Bird's case.
acc. Vid Hill.
16 Car. in C.B.
Merth. 93.
Hugh. Abridg.
verb. Adm.
p. 117.

Note, An Administration cannot be revoked for the not bringing in of the Inventory, and the Account of the Administrator : And the Ordinary upon an Administration granted, had not [*before the said Statute*] power to make any Distribution of the Surplusage, nor to take any Bond for to answer the Surplusage, by the true meaning of the Statute of 21 H.8. which intends a benefit to the Administrator, and not an unprofitable burden. (e) The Ordinary hath not power to make Distribution of the Goods, because there may be a Debt which was unknown ; and if he might distribute, then the Administrator should be charged with the Debt of his own Goods. Vid. *Briersley's Case*, *Brown* 1. part. 31. acc. Whether this were Law then is a needless Question, it being otherwise now by the Statute aforesaid.

C H A P. XXXIII.

Of Right to Administration.

1. *What the Method of Succession is by the Laws of this Realm.*
2. *How the Civil Law understands it.*
3. *The difference between the words, [Kindred and Consanguinity;] between [Cognatos and Agnatos.]*
4. *Whether an Alien, no Denizen, may be an Administrator.*
5. *Administration granted a Caveat depending, is void in Law.*

(a) 31 Ed. 3.
c. 11 & 21 H.8.
c. 5. Littl. Bro.
Seal. 233. 415.
Fitzh. Excom.
13. Coke 9. 39,
40. & 140.
Dyer 339. &
4 H.7. 14.

BY the Law, both by the Statute Laws, the Common Law, and by the Civil Law, the nearest of Kin to the deceased Intestate, is to succeed in the Administration of his Goods. (a) As first to the Husband or Wife ; but if they fail, then secondly, to the Children, whether male or female ; but if they fail, then thirdly, to the Parents, whether Father or Mother ; but if they fail, then fourthly, to the Brothers or Sisters of the whole blood ; but if they fail, then fifthly, to the Brothers or Sisters of the half-blood ; but if they fail, then sixthly, to the next of Kin, as Uncles, Aunts, &c. From these the Ordinary cannot grant the Administration to a Stranger, if they seasonably require it, and are not otherwise affected by some legal impediment : But he may grant it to which of these he please, if divers of them in equal degree do desire it ; yea, to a Stranger if they neglect it. Yet here note, That notwithstanding the premises, Brothers and Sisters of the half-blood are held in as equal degree of Kindred to an Intestate, to have Letters of Administration granted to him or her, as one of the whole-blood, and the Ordinary may grant them to which of them he please.

please. (1) And therefore in the Case of a Prohibition granted to the Ecclesiastical Court, for granting Letters of Administration to a Sister of the half-Blood; when there was a Brother of the whole-Blood who sued for them. It was agreed by the Court, That it is in the power of the Ordinary, to grant Administration either to the Brother of the whole-Blood, or to the Sister of the half-Blood, at his election, because they are in equal degree of Kindred to the Intestate. (2) It is not improbable, but that the reason hereof in Law may be, for that the words [*Next of Kin in equal degree*] mentioned in the Statute, may possibly be meant and intended to refer rather to the nighness or remoteness of the Blood to the Intestate (as to the equality thereof) then to the totality or partiality of the Blood; in which respect they may be of an unequal degree, though both alike next (in equal degree) to the Intestate in reference to remoter Kindred. But if Administration be granted to the Husband and Wife, where the Husband is not of Kin to the Intestate, but a Stranger. In such Case, if he survive his Wife, he should have all the Goods, and the Kindred be defrauded, which is not reasonable, and therefore such Administration shall be void. (3)

2. The Civil Law, as to the Intestate's Estate, whether real or personal, considers it all under the same notion; yea, in this case it makes no distinction either of Ages or Sexes; but all that are concern'd may challenge an equal proportion, provided they be of equal degree, and of identity in Blood, whether of the whole or of the half-Blood. But the Wife was otherwise provided for by the Civil Law: (b) Therefore exempted from a Succession to the Goods of her intestate Husband. There are but three orders or degrees chiefly of Kindred, which the Civil Law doth specially take notice of: The first is the right Line Descendent, as, Children, Grand-children, and so downwards. The second is in the right Line Ascendent, as, Parents, Grand-parents, and so upwards. The third is in the Line Transversal or Collateral, as Uncles, Aunts, Great-Uncles, and so side-wards; always remembering that the whole-Blood is more worthy than the half-Blood; and the higher degree more worthy than that which is more remote.

3. *Consanguineus*, or *Consanguinity*, and *Agnatus* properly so called, and strictly so taken, doth comprehend only them that be of Kin by the Fathers side. (c) Therefore the word *Kin* or *Kindred*, is of a greater latitude than *Consanguinity*, because it comprehends *Cognatos* as well as *Agnatos*, and so comprehends all the Relations of both Lines, both male and female; for *Cognati* properly understood, signify only such as are of the Mother side, and of the female Line. And here note, that the most remote *Agnati* or Kindred of the Line male in a right Line Descendent, are preferred

(1) Styles Re.
gift. 22.

(2) Mich. 23
Car. B.R. Style,
74. 75. Vid.
Pasch. 24 Car.
B.R. Hill &
Bird's Case.
Styles 102. acc.
vid. Hugh. A-
bridg. ver.
Adm. in fin.
p. 119.

(3) Hugh. ibid.

(b) L. 4. Sol.
Mart.

(c) Franc. in c.
Sciand. de Elect.
6. 2. Alex. Conf.
229. nu. 10.
vol. 6.

(d) Cowell Inst.
jur. Angl. lib. 3.
tit. 5.

(e) Glanville
lib. 7. cap. 1. &
Cowell ubi sup.
lib. 3. cap. 1. §. 1.

(e) Cro. Rep.
Pasch. 1. Char.
1. in Sir Upwel
Caroon's Case.

(g) Mich. 42
Eliz. Willough.
& Willoughby's
Case Goldesb.
119.

*Pasch. 13 Jac.
B.R. Case Hit-
ching ver. Glo-
ver.

Roll. Abridgm.
tit. Executor.

ferred before the nigheft Kindred of the Female Line ; but it is otherwise in a Transverfal or Collateral Line. (d) But as to Land in Fee, or of Inheritance, the right thereof *quafi ponderofum* ever descends Downwards in a Right or Transverfal Line, and never doth re-afcend the fame way that it descended by the Ancestors death ; yet it may afcend à *Latere*, or fide-ward, for want of right Heirs in the Descendent Line, (e) which often happens.

4. Suppose an Alien born, and not made Denizen, happen to die Intestate within this Realm, having Kindred born beyond Sea, and others, though more remote, born in this Realm : In this Cafe, an Alien may be Administrator, and have Administration of Leases, as well as of personal things, because he hath them as an Executor in anothers right, and not to his own use : And he may be an Administrator, as well as a person Out-lawed or Attainted may be an Executor ; and no Prohibition will lie in this Cafe. (f) See the Cafe *ut supra*, cap. 31. parag. 7.

5. An Administratrix sued the Defendant in the Court of Chancery : The Defendant shewed, That before Administration was committed to the Plaintiff, he had put in a Caveat in the Ecclesiastical Court, hanging which Caveat, the Plaintiff obtained Letters of Administration ; of which he demanded Judgment pendant the Appeal. It was said that the same was a good cause to stay the Suit until the Appeal shall be determined. In this Cafe it was also said, That the same was not like unto a Writ of Error ; for by the purchasing of a Writ of Error, the Judgment is not impeached, until the Record be reversed : But the very bringing of an Appeal, is a suspension of the first Judgment for the principal matter. (g)

If after a *Caveat* entred against the granting of Letters of Administration, they be (notwithstanding such *Caveat* depending) granted by another, it is good at Common Law ; *otherwise at the *Spiritual* Court, where by the Civil Law, an Administration granted (a *Caveat* depending) is void.

If an Executor die Intestate, Administration ought to be granted of the first Testator, for now he is dead Intestate, 21 *Ed.* 4. 24. 26 *H.* 8. 7. But if an Executor after Administration, die Intestate, and the Ordinary grant Administration of all the Goods of the Executor, he may Administer the Goods of the first Testator, 10 *Ed.* 4. 1. *Quere*, if an Administrator doth make an Executor, and dies, his Executor shall not have the Administration of these Goods, but a new Administration ought to be granted of them, 34 *H.* 6. 14 *D.* 32 *H.* 8. 47. 11. *Co.* 5. *Brud.* 9. b. Adjudged. And if an Executor, before Probate of his Testator's Will, doth make his Executor, and die, the Executor's Executor cannot take upon him the Execution of the first Testament ; but Administration

tion of the first Testator's Goods is to be granted *cum Testamento annexo*, D. 22, 23 Eliz. 372. 8.

C H A P. XXXIV.

Of Succession in the Right Line Descendent.

1. *What the Jus Representationis is ; or, that several Children by one Father deceased, do Conjunctim represent the person of that Father.*
2. *That Succession (when the Case so requires) is to be computed in Stirpes, not in Capita.*
3. *That the Grand-child (living the Father) succeeds not to the Grand-father ; nor (by the Civil Law) if conceived after his Grand-father's death.*
4. *How the Succession (according to the Civil Law) is, in Case of Children not all of them by the self-same Parents ; and how at Common-Law.*

1. **N**EXT to the Widow, this right of Succession in the right Line Descendent is the first degree of right to the Administration of an Intestate's Goods ; for they are in the first place admissible to such Administration, who are of the right Line Descendent from the deceased : So that if a man die Intestate, leaving behind him Children, Parents, and Collateral Kindred, the Children do in the first place succeed as to the Goods whereof he died Intestate, exclusively to the Grand-children whose Parents are living. It is otherwise, if their Parents be dead ; for if a man die, leaving one Son, and one or more Grand-children by another Son deceased, these Grand children are admissible, together with that living Son, their Uncle. And this is *Jure Representationis*, whereby several Children of one Father do *Conjunctim* represent the person of that Father : But yet this must be understood according to the Law-terms, not *in Capita*, but *in Stirpes* only, that is, not according to the several Branches, or by Poll, as we use to say, but according to the one *Common Root* of those several Branches ; and therefore put all the Grand-children together, they can have no greater proportion among them all than singly belonged to their Father, were he then alive. So that in the fore said Case, the Estate is to be divided into two equal parts, whereof one moiety is due to the Son, the other moiety to the Grand-children, to be equally divided amongst them. (a) And this Right or Law of Representation holds *in infinitum* in the right Line Descendent ; (b) contrary to the opi-

(a) §. Cum filiis. Inst. de hered. quæ ab intest. & Graf. §. Successio ab intest. q. 2. nu. 6. & Capriol de Success. ab intest. lib. 1. nu. 602.

(b) Capriol. ibid. & Graf. ibid. q. 2. nu. 13. Covar. Pract. quæst. cap. 38. nu. 5. & Gomez. Resol. Tom. 1 cap. 1. nu. 15.

nion of the Famous *Bartol*, who held, that it reached not beyond the Great Grand-children.

2. In like manner, if there be divers Grand-children by divers Sons deceased, and no Son living, they succeed to their Grand-father *in Stirpes*, not in *Capita*, that is as aforesaid, not according to the distinct number of the several Grand-children, but according to the number of their Fathers or Sons to the Intestate; so that the Grand-children by each deceased Son to the Intestate shall *Conjunctim*, and amongst them all respectively have just that proportion, which their respective Fathers or Sons to the Intestate could challenge, if they had been alive at the time of the Intestate's decease; so that two Grand-children by one Son, have no more than one Grand-child by another Son, because the Son by whom are the two Grand-children to the Intestate, could have no more than the Son by whom there is but one Grand-child, in case both the Sons had been living when the Intestate died. Indeed, if there be no Grand-children, save only by one Son, then they succeed equally according to their number, unless they be in unequal degree, as Grand-children and Great Grand-children. And the reason why Succession goes *in Stirpes*, not *in Capita*, is, because they succeed not in their own right, but in the right of their Ancestor.

3. A Grand-child whilst his Father is alive, hath not the precedent right to the Administration of the Goods of his Grand-father dying Intestate; nor doth a Grand-child succeed to his Grand-father, unless he be born, at least conceived, at the time of his Grand-father's death. (c) So that a Grand-child conceived after his Grand-father's death, is not in his own person by right of Representation (according to the Civil Law) admissible to succeed his Grand-father: (d) And that which hitherto hath been said of Sons and Grand-sons holds true in Law as to Daughters and Grand-daughters, who are equally with the other admissible to a Succession of their intestate Parents Goods without any distinction of Sex. (e)

4. Whereas the Law is, That Children shall succeed equally to the Administration of their Intestate Parents Goods, this must be understood only of such Children as are begotten of the self-same Parents; for if there be Children by divers Parents, as if a Woman hath had two Husbands, and one Child by the first, two by the second: In this Case, each of them respectively succeeds (according to the Civil Law) only to the Goods of his own Father, but all of them equally to their Mothers. (f) And this also by the same Law holds true as to the Grand-children by such Children of each Marriage respectively. Otherwise it is, if a man hath had two Wives, with Goods and Children by each of them, and die Intestate, leaving no Relict or Widow; for in this Case, all the Children by both

(c) Barry de
Succesf. Intest.
nu. 5.

(d) Graf. ubi
sup. q. 2. nu. 16.
Guid. Pap. q.
612. Capriol.
ubi sup. l. 1. nu.
619. § & licet.
Inst. de hered.
quæ ab Intest.

(e) Graf. ibid.
q. 2. nu. 2.

(f) Graf. ibid.
q. 17.

both Wives shall equally succeed to the Goods and Chattels of their Father dying Intestate.

In the Case of a Prohibition granted to the Ecclesiastical Court, for granting Letters of Administration to a Sister of the half-Blood, when there was a Brother of the whole-Blood, who sued for them. It was agreed by the Court, That it is in the power of the Ordinary to grant Administration either to the Brother of the whole-Blood, or to the Sister of the half-Blood, at his Election, because they are in equal degree of Kindred to the Intestate. But if Administration be granted to the Husband and Wife, where the Husband is not of Kin to the Intestate, but a Stranger: In such Case, if he survive his Wife, he should have all the Goods, and the Kindred be defrauded, which is not reasonable; and therefore such Administration shall be void. (g)

(g) Mich. 23
Car. in B.R.
Styles 74, 75.
Vid. Pasch.
24 Car. in B.R.
Hill. & Bird's
Case. Styles
102. 220.

CHAP. XXXV.

Of Succession in the Right Line Ascendent.

1. *Whether Parents, specially the Mother, be next of Kin to her Child.*
2. *The Method of Succession (by the Civil Law) in the Right Line Ascendent.*
3. *How the Succession goes by the Civil Law, when some of the Collaterals concur with those of the Ascendent Line.*
4. *Whether by the same Law the deceased's Brothers and Brothers Children may concur with their Parents to the Succession.*

1. **N**otwithstanding that Maxim at the Common Law, That Inheritance cannot lineally Ascend, yet is the Parent more nigh of Blood to the Child, even by that Law, than is the Uncle.

(a) And by the Civil Law, as the Son and Daughter be in the first degree of Kindred in the Line Descendent: So the Father and Mother are in the first degree of Kindred in the Line Ascendent. (b)

To constitute a Kindred, it is sufficient that the Relations do centre and agree in aliquo tertio, or flow from one common Head or Fountain, or spring from the same Stock or Root: Thus the Father and the Daughter, the Mother and the Son, the Mother and the Daughter, the Father and the Son, they flow from one and the same Fountain, they spring from the same Root, viz. the Grandfather; and therefore are of Kin each to other. And by the Laws of this Realm Parents are reputed to be of Kin to their Children, and the Mother to be of Kin to her Child; and therefore by the

(a) Littl. Tenure fol. 1.

(b) § 1. Instit. de Grad. Cognat.

Statute

(c) Stat. de Marlebridge an. 52 H. 3. & Bro. Abridg. tit. Adm. inist. 47. Coke 1. 3. Ratcl. Cafe. (d) Intest. de S. C. Tertil. in Prin. (e) Auth. Novel. de hared. ab Intestat. (f) Bro Abridg. tit. Adm. inist. nu. 47. & Coke 1. 3. in Ratcliff's case. *enm. simil.* This remarkable Case of the D. of Suff. wherein the point was, Whether the Mother or the half-Sister ought to have the Administration, is at large in Swinb. par. 7. §. 8. nu. 10. with the reasons of Judgment exactly weighed and considered. (g) 21 H. 8. c. 5. (h) §. Si igitur. Novel. ibid. ubi sup. & DD. in l. cum ita §. fin. ff. de Leg. 2. Grassl. Thef. Com. Op. §. Fidei Com. inist. q. 16. (i) Grassl. §. Success. ab Int. q. 22. (k) Grassl. ibid. Greg. cap. 9. nu. 21. Covar. de Success. ab Intest. & Cuj. ubi sup. (l) Grassl. ibid. Greg. cap. 9. nu. 11. Covar. de Success. ab Intest. & Cuj. ubi supra.

Statute Law, if a man seized of Lands in Socage, his Heir being within the Age of Fourteen years: In this Case the Mother shall have the Wardship of her Son, as being next of Kin to whom the Lands cannot descend. (c) Indeed, by the Law of the twelfth Table, the Mother could not succeed to her Children, nor they to her. (d) But this is now altered, the Law being now otherwise. (e) It cannot be denied, but that this Question, *Viz. Whether the Mother be of Kin to her Child?* hath been much controverted amongst the ablest Lawyers; and in the close of all, after much dispute it hath been adjudged in the Negative, *viz.* That the Mother is not of Kin to her Child. (f) As in that remarkable Case of the D. of Suffolk in Edward the Sixth's time, wherein an Administration was granted away from the Mother to a Sister of the half-Blood. According to which Judgment, divers other Administrations for several years after were granted away from the Mothers, to the Brethren and Sisters as next of Kin. Notwithstanding all which, the Law indeed being all that while quite otherwise than was practised; at last the Truth prevailed, and the practice now frequent, and Judgment every where given for the Mother, that she is of Kin to her Child, (g) who dying Issueless and Intestate, the Administration of his Goods may be committed to her as next of Kin, according to the Statute. Or if he be Issueless, but not Intestate, and maketh his Kin his Executor, or bequeath the residue of his Goods to his Kin: The Mother in this Case is admissible to the Executrixship as next of Kin to her Child, or on the same account to enjoy the Legacy during her life, and after her death, then the other next of Kin. (b)

(2) If the deceased leave no Children, they in the right Line Ascendent do by the Civil Law succeed him, but in this Order: First, the Father and Mother succeed equally, and exclusively to all others that are of a more remote degree; or the Mother only, if the Father be not alive; or the Father only, if the Mother be dead. (i) And if there be several Parents of a distinct Line, who are equal in degree, but unequal in number, they succeed according to their Stock or Root, not according to their number; thus the Grand-father by the Father's side shall have as much as both Grand-father and Grand mother by the Mother's side. (k) But if the Parents be in an unequal or different degree, then the right of Representation doth cease, and the nigher shall ever exclude the more remote. Thus the Father excludes both the Grand-fathers by the Fathers and Mothers side, and the Mother both the Grand-mothers. (l)

3. There are also some of the collateral Line, who by the Civil Law do concur with those of the Ascendent Line; for the Brothers and Sisters of the deceased do succeed him, together with the Father

Father and Mother: (*m*) And the Succession when the Brothers concur, is proportioned according to their number. (*n*) But if there be divers Kindred of the same degree to the Intestate, whose Father is dead, whereof some are by the Father's side, others by the Mother's side, as if the deceased leave a Grand-father by his Father's side, and a Grand-father and Grand-mother by the Mother's: In this Case the Succession is not proportioned according to their number, but it is to be divided into two equal parts, and the Grand-father, by the Father's side draws the one moiety, the rest the other moiety. And if it happens, that together with those of the Line Ascendent, and with Brothers of the whole Blood to the deceased, there be the Sons of other Brothers of the whole-Blood deceased: In this Case, the Sons of such Brothers deceased shall succeed together with the others, but not according to their number, but according to their Stock or Root; that is, those Sons of such deceased Brothers, shall among them all, have only that proportion which would have come to their Fathers, if they had been alive. (*o*) Here note, that this is meant only of the Children of such Brothers deceased; therefore the Grand-children, and others more remote are not admitted together with the Parents, and Brothers and Sisters of the deceased. (*p*)

4. Brothers and Sisters only of the half-Blood to the deceased, do not concur with the Parents in the Succession. (*q*) Thus the Grand father in Succession to his Grand child doth exclude the Brothers of half-Blood to such Grand-child, unless the Brothers be of the same Blood, and of the same side with such Grand-father. (*r*) And if a man die Intestate, leaving a Mother, and the Children of his Brothers deceased behind him, the Mother alone shall succeed to the Intestate, (*s*) unless there be other Brothers of the deceased then living; for then the said Children of the said Brothers deceased shall concur with the Mother. (*t*) Thus Brothers and Brothers Children may concur with their Parents to the Succession of the deceased, but all other Collaterals are excluded by the Parents; inasmuch, that the Uncles both by the Fathers and the Mothers side are excluded by the Grand father and Grand mother of the deceased. (*u*)

(m) Grassibid.
Greg cap. 9. nu.
12 Capiol. l. 2.
nu. 76. de Suc-
cess. ab Intest. &
Auth. Novel. de
hered. ab Intest.
(n) Novel. 118.
Cujac. lib. Covar.
de Succes. prog.
l. 1. §. 25. nu.
38. Pet. Greg. l.
45. c. 9. nu. 13. &
Mynsing. Ob-
serv. Cent. 6.
n. 41.

(o) Grass. q. 23.
Greg 29. Cujac.
in Novel. 118.
(p) Grass. & Co.
vari ubi supra.

(q) Grass. q. 24.
& Fach l. 6. c. 1.

(r) Pap. l. 2. §.
tit. 1. art. 8.
Guid. Pap. Con-
sil. 176.

(s) Meynard. lib.
2. cap. 21.

(t) Meynard lib.
ita judicat. in
Airesto Tholo.

(u) Decii Con-
sil. 623.

C H A P. XXXVI.

Of Succession in the Line Transversal or Collateral.

1. *The Line Collateral is two-fold: In which Line the Jus Representationis holds only in Brothers Children, not in their Grand-children.*
2. *Regularly the whole-Blood is ever first Admissable to Succession in the Line Transversal or Collateral.*
3. *Yet in that Line the nigher Degree, though but of the half-Blood, is preferrable before a remoter Degree of the whole-Blood.*
4. *How far and to what Degree Collateral Kindred may succeed each other.*
5. *How the Succession goes in case the deceased leaves no Children, but Kindred only by the Ascendent and Collateral Line.*

1. **T**HE *Transversal* or *Collateral* Line is two-fold; the one *Descendent* by the Brother and his Children downwards; the other *Ascendent* by the Uncle, and so on upwards; and none of the *Ascendent* do ever succeed, unless they of the *Descendent* Line do fail. (a) And the nighest degree to the deceased in the *Descendent* Line do succeed first; but that failing, then the nighest of *Kin* in the Line *Ascendent*. And although Brothers Children of the whole Blood do ever exclude Brothers Children of the half-Blood, yet this *Jus Representationis* in the *Collateral* or *Transversal* Line holds only in Brothers Children, not in their Grand-children. (b) So that if *A.* die, leaving behind him Children by one Brother deceased, and Grand-children by another Brother also deceased, these Grand-children of the one, are excluded by the Children of the other. (c) For in a *Transversal* or *Collateral* Succession the Son alone doth represent the Father, and then only when the Controversy is touching the Succession of his Uncle, (d) not of his Great Uncle, or others of any degree higher or farther off. (e) But when the Children of Brothers deceased do concur with other Brothers of the deceased, then they all succeed according to the Stock or Root, and they draw no more than their Father should have done if he had been then alive. (f) And by the said Law of Representation it comes to pass, That Brothers Children who are in a third Degree, are by way of Fiction supposed to be in the second Degree, and so are preferred before the Uncles of the deceased, who are in the same third Degree. (g)

2. In the *Transversal* or *Collateral* Line this is a perpetual Rule, That they are first to be admitted who are of the whole Blood

(a) Brañ. l. 2. c. 30. nu. 1. Britt. c. 119.

(b) Cujac. ad. Novel. 18. Capriol. lib. 3. nu. 125. Graff. q. 31. Pet. Greg. l. 45. c. 11. nu. & Covar. de Succes. ab Int. Peregr. art. 21. nu. 7. 8. de Fidei Commis.

(c) Alex. l. 2. Conf. 5.

(d) Ibid. Infinit. Confil.

(e) Menoch. l. 4. Præf. 95. nu. 8.

(f) Graff.

(g) Novel. 118. cap. 3. & Cujac. ib. & Pet. Greg. c. 11. nu. 7.

Blood of the deceased. As thus : *A.* having *B.* a Son, and *C.* a Daughter by one Wife, and *D.* a Son by another Wife, dies ; *B.* succeeds him, and dies Issueless : In this Case, *C.* the Daughter to *A.* and Sister to *B.* by the whole-Blood succeeds him, and not *D.* the Brother by the half-Blood. (*b*) In like manner *E.* having *F.* a Brother and two Sons, *viz.* *G.* by one Wife, and *H.* by another Wife dies : *G.* succeeds him, and dies Issueless : in this Case *F.* Uncle to *G.* (who is of the whole-Blood succeeds him, and not *H.* Brother to *G.* by the half-Blood. (*i*) But if *F.* also die Issueless, then *H.* succeeds him, because he is allied to him both ways, as well by the Grand father, as by the Grand-mother. (*k*) And therefore, unless *F.* be Brother to *E.* as well on the Mothers side, as on the Fathers side, the Succession will be otherwise. And in case Lands be devised to one and his Heirs, if he happen to die without Heir, they shall go to his next Brother. (*l*)

3. Suppose a man dies, leaving behind him neither Children, Parents, Brothers, nor Sisters, nor their Children, but only Brothers Grand-children, Uncles, and other Collateral Kindred : In this Case we must follow the Rule of Law, the nigher in degree shall have the precedency in right ; and if there be divers in the same degree, they are all equally Admissible according to number, not Root or Stock, and that without distinction of Sex, consideration being had only of the Kindred it self. (*l*) Again, suppose there were three Brothers, whereof two of the whole-Blood, and one of the half-Blood : If these two of the whole-Blood die, each of them leaving a Child behind him, whereof one afterwards dies also, and Issueless : In this Case the surviving Uncle is preferred before the other Son by the Brother, albeit that Brother was of the whole-Blood to the Father of the deceased. (*m*) So also the Uncle of a deceased is preferable before his Brothers Grand-children, albeit the said Grand-children proceeded of a Father who was of the whole-Blood to the deceased, and the surviving Uncle but of the half-Blood. (*n*) For in the Collateral Line the being of the whole or half-Blood is not considerable beyond Brothers Children ; for then the nearness of degree, not whether whole or half Blood is considerable : So that although a Brothers Son of the whole-Blood shall excuse a Brother of the half-Blood, yet even the Children of Brothers and Sisters of the half-Blood, shall exclude remoter Kindred of the whole Blood in the Collateral Line. (*o*) The reason in Law is, because (as aforesaid) in a Transversal or Collateral Line, the nigher degree, though but of the half-Blood, shall be preferred before a more remote degree of the whole-Blood ; which yet doth not hold in a right Line, whether Descendent or Ascendent. And if a man die, leaving neither Children, Parents, Brothers, Sisters, nor their Children behind him : In this case, the

(b) Litt. l. i. c. 1. & Britt. c. 1. § nu. 7. Fleta l. 1. c. 1. § omnes autem. & § justicium. & § quandoque.
(i) Litt. ibid. Coke l. 3. in Ratcliffs Case, fol. 40 b & 41. a. b. & 42. a.
(k) Litt. ibid. paulo post.
(l) Cro. 2. 415. 459. Child vers. Bailly, and others.
(m) Graff. §. Successio ab intest.
9. 33.
(n) Rauchin. Decis. par. 4. Consil. 45. & Alex. l. 5. Consil. 116.
(o) Boetii Decis. 302.
(p) Authen. post. fratres de Legat. hared.

Uncles and Aunts concur in the Succession, and exclude all other collateral Kindred, because there are none others in the third degree, as they. After these, then do succeed the great Uncle and the Brothers Grand-children, to whom the deceased was a great Uncle, all in a parity, because they are in the fourth degree. And here note, that Nephews and Nieces succeed together with their Uncles and Aunts in the Goods of their Grand-father and Grand-mother, yet only for such a proportion, and for so much as should have come to their Parent, if he or she had been alive; for it is in a conjoyn'd, not in a distinct sense, that a *Jus Representationis* is here in force.

(p) §. ult. Inst.
de Success. Cog-
nat.

4. It is a Question how far, and to what degree collateral Kindred may succeed each other. The Civil Law puts a difference in this Case between collateral Kindred by the Male Line, and collateral Kindred by the Female. It is said, that Kindred by the Fathers side may, even in collaterals, succeed even to the tenth degree *inclusive*, and by the Mothers side to the sixth degree. (p) For the Kindred by the Mothers side is not extended so far as that of the Fathers side, because, that by the Mothers side is only beholden to, and holpen by the *Prator*, or the *Prætorian Law*; but that of the Fathers side hath also the Civil Law to confirm it. But this difference or distinction being of no use or practice with us, let us not mistake upon this ground, and thereby without cause, occasion our Theory to beget an Error in Practice. For in very deed, this difference or distinction is now removed by the Civil Law it self; for whereas the old Law of the *Digests* and *Codes* did distinguish between Kindred by the Father, and Kindred by the Mother, now by a later Law of the *Novels*, this difference or distinction is abolished.

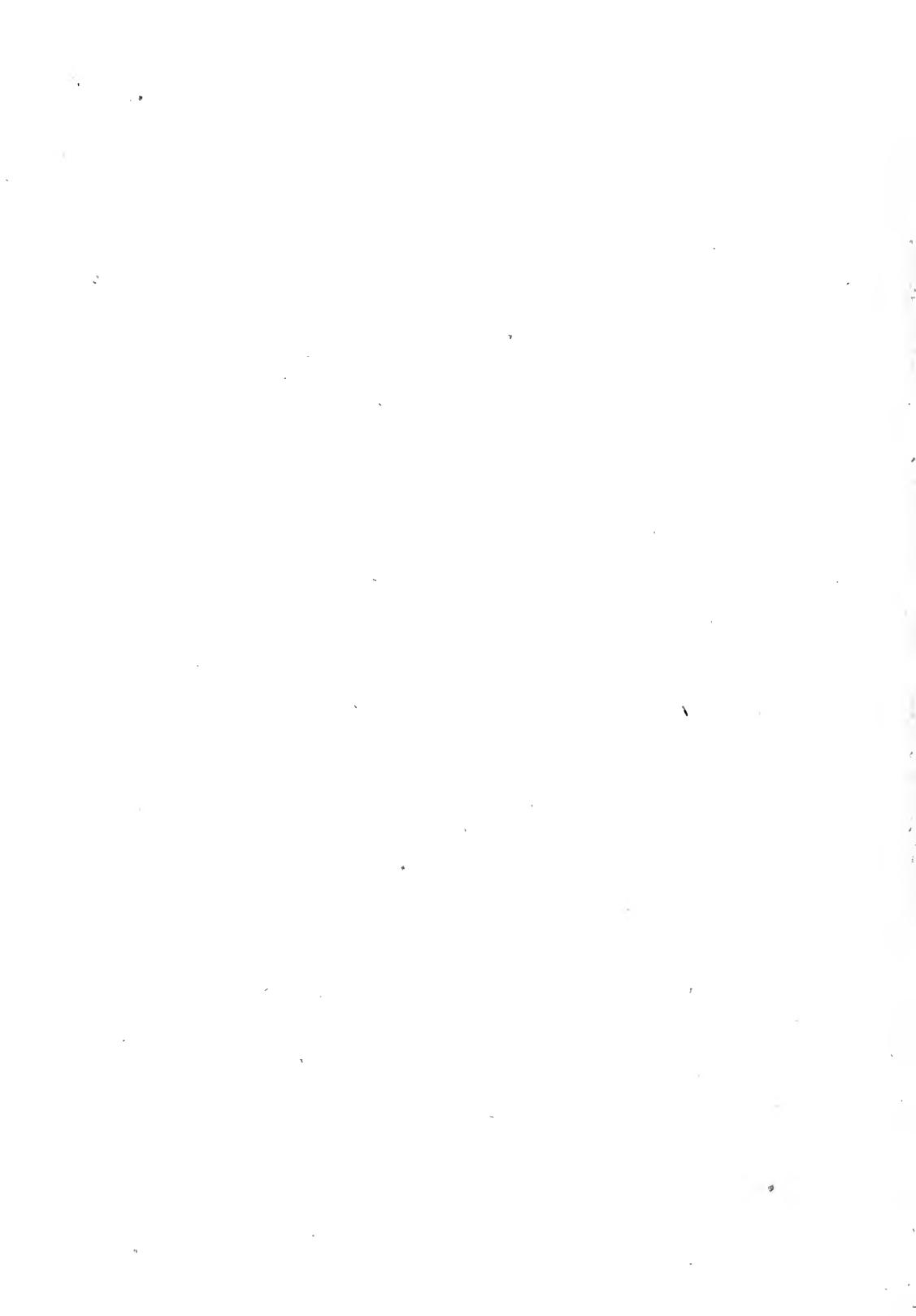
(q) L. Prætor. ff.
de Col. 60.

5. Lastly, if the deceased left no Children, but Kindred by the Ascendent and Collateral Line: Then for a yet clearer discovery of the right of Succession, distinguish thus; *viz.* Either he hath only Brothers of the whole-Blood, or only such Brothers Children; or he hath Brothers by the half-Blood, or such Brothers Children: In the first case, the Brothers only succeed; in the second case, only the Brothers Children; in the third case, the half-Brothers and such Brothers Children succeed equally according to their Stock or Root, not according to the number of their persons. (q) Likewise if one die, leaving one Brother and three Children of another Brother deceased of the whole-Blood, the Brother alone shall have (as formerly declared) as much as the said three Children; and these do succeed exclusively to all other collateral Kindred. Also Brothers of the half-Blood do exclude other collaterals Ascendent, as Uncles, Aunts, whether by the Father or the Mothers side, and that without distinction of Sex.

Sex. (r) But put case a man dies without Children or Parents, leaving one Brother by the Fathers side only, another Brother by the Mothers side only : For instance, A man having had two Wives, and a Son by each, dies ; and the second Wife takes another Husband, having a Son by him ; then if the Son by the second Wife of the first Husband dies, he leaves a Brother of the half-Blood by the Father, and a Brother of the half Blood by the Mother : In this Case, the Civil Law says, that the Brother by the Fathers side shall succeed in the Goods that came by the Father, and he by the Mothers side in the Goods which came by the Mother, (s) and both of them equally as to all Goods otherwise acquired ; but our Law knows no such distinction, for they shall succeed equally, being equal in Degree and equal in Blood, because by Marriage all was invested in the Father.

(r) Auth. de hæred. ab intest. §. reliquum. & §. seq. C. de hæred. Auth. cessante. & Auth. Tres fratres.

(s) Cod. de Leg. hæ. de Eman. cipat. in fin.



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- Chap. XXIII. *Of Legacies relating to Debts, with certain Cases in the Law touching the same.*
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- Chap. XXV. *When and how Legacies are null, or become void or voidable; with certain Cases in Law touching the same.*
- Chap. XXVI. *Certain Positions or Assertions of Law for the better understanding of this Subject of Legacies and Devises; with certain mixt Cases touching the same.*
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THE

T H E

Orphans Legacy.

PART III.

Of Legacies and Devises.

C H A P. I.

Of Legacies and Devises in general.

1. *What a Legacy or Devise is.*
2. *What are the Requisites to the making of a good Devise.*
3. *Whether is more considerable as to Legacies, the time of making the Testament, or of the Testators death.*
4. *In what Court Legacies and Devises are properly Recoverable.*

I. **A** Legacy, called a *Devise* at the Common Law, (a) (a) Terms of Law. ver. Devif. is some particular thing or things given or left either by a Testator in his Testament (wherein an Executor is appointed) to be paid or performed by his Executor, (b) (b) §. 1. Inst. in a Codicil or Last Will (wherein no Executor is appointed) to be paid or performed by an Administrator. (c) (c) §. Non autem. Inst. de Codicil. Et l. ab Intest. ff. de jure Codicil. The word *Devise* is specially appropriated to a Gift of Lands; the word *Legacy* to a Gift of Chattels, though both are used promiscuously: For a *Devise* is said to be, where a man in his Testament giveth or bequeatheth his Goods or his Lands to another after his decease. (d) (d) Terms of Law, ubi sup. Observe, it is formerly said, That a Legacy is a particular thing given by Last-Will and Testament: For if a man dispose or transfer his whole Right or Estate upon another, that, according to the Civil Law, is called *Hæreditas*, and he to whom it is so transferr'd is termed *Hæres*; but at Common Law he is the *Heir* to whom all a mans Lands and Heredita-

ments

(e) Cowel Inter.
verb. Devise.

(1) Auth. tit. 1.
Novel. 1. Col. 1.

ments do descend by right of Blood : And by the same Law the word [*Devise*] from the *French Deviser*, is properly attributed to him that bequeaths his Goods by his Last-Will or Testament in writing : The reason being, for that those Goods that now appertain only to the *Devisor*, are by this act distributed and divided into many parts. (e) By the Civil Law, Executors or Administrators in performance of the deceased's Will, shall pay his Legacy's or Bequests within one year next after his decease : And in case they be once sued for the same, they shall forthwith pay that which is due upon the Will (deducting only a fourth part, which is due unto the Heir by the Law *Falcidia*;) or else to lose such Legacies as themselves have in the Will. (1)

(f) Perk. Sect.
400

(g) L. terra & l.
cum qui ff. de
Probat.

(h) L. si ita lega-
tum. de aur. &
arg.

(i) Bartin lult.
§. de Leg. 2.

(k) Bald. Conf.
28 p. nu. 1 vol. 2.

(l) Rom. in Auth.
Sim lit E nu. 93.

& C. ad Leg.
Falcis l. Si cog-
natis.

2. To the giving of Legacies, or to the making of a good and sufficient Devise, there are several things required. The person of the Devisor must be legally qualified to devise; the thing devised must be such as is legally devisable: The Devisor at the time of making the Devise, must have *Animum Testandi*; that the Devisee or Legatary be in his person such as is capable of taking by way of Devise; that there be no co-action on the Testator, but that his Will be free and independent, without fear, force or flattery, or other sinister Contrivances; that the Devise be made in that due manner and form as it ought to be; that the thing devised, be devised upon none other than (if any) lawful Terms and Conditions; that the Words of the Devisee be such as do clearly declare the mind and intention of the Devisor; that Probate be made of the Testament, after the Devisors death: (f) And in case it be of Land, then that the Devisor be solely seised thereof in a Fee-simple Estate, and not jointly with another, and that the Testament, wherein such Devise of Land is, be made in writing.

3. To find out the Testators mind and meaning, which is the very Index of the Testament, the time of making thereof is regularly more considerable in point of Legacies, than the time of the Testators death, because the presumption of Law is, That his mind is not altered, (g) unless it may otherwise appear by sufficient Evidence. Therefore the Testators words are specially to be referred to the time when the Testament was made, (h) and more especially if the Testators words be general words. (i) So that if a Father bequeath to his Son, who is a Student, all his Books, and after buy other Books, those other pass not by that Legacy. (k) Or if he bequeath 10 l. to his Parish-Church, and after remove his Habitation into another Parish, where he dies, the 10 l. is due to the Parish wherein he lived at the time of making his Testament, and not to the Parish wherein he died. (l) Yet if the Testator bequeath any thing to his Kindred (in such general

ral words) the Kindred which were at the time when the Testament was made, are not so included, as to exclude such as were his Kindred at the time of his death. (m) Also if a Testator bequeath his Moveables, such only are understood to be bequeathed as were the Testators when he made his Testament. (n) Likewise if the Testator bequeath Releases to all his Debtors, there are no more comprehended in that Legacy than were his Debtors when he made his Testament. (o) Or if he give to a certain Hospital all his moneys in the Bank, or in Bankers hands, after his Debts paid, and there be at that time 1000 *l.* in their hands over and above his Debts, and he lives so long, that at his death there is 3000 *l.* in their hands above his Debts: In this Case, there is only 1000 *l.* due by that Legacy to the Hospital, because the Legacy is to be computed according to what he had in their hands at the time of making his Will, and not according to what he had at the time of his decease. (p) If the Testator bequeath any thing to God, it is to be paid to the Church of that Parish whereof the Testator was an Inhabitant when he made his Will: And the Bishop is to see such Legacies performed, as are bequeathed for the Redemption of Captives, or other pious Uses: And therefore if one devise by his Last-Will a Chappel or Hospital to be built, the Bishop is to compel the Executors to perform the same within Five years, not next after the making of the Testament, but the time of the Testator's death: And if the Testator nominate any Governor, or Poor thereto, they are to be admitted, unless the Bishop shall find them unfit for the same. (2) Also if he bequeath all his Moveables, having at that time Fruits of the Earth not separated from the Soyl, which yet afterwards and before his death are separated: In such Case, such Moveables pass not by that Bequest, because they were not Moveables at the time of making the Testament: (q) But this is not uncontrovertible; for in this point there are some of the Learned of another Opinion. (r) Or if a man bequeath so many pieces of such a certain Coyn, which afterwards doth rise or fall in its value; the Legacy in that case shall be estimated, as the said Coyn was in value at the time when the Testament was made, not at more or less. (s) Also if a House, with all things therein bequeathed, such things as the Testator afterwards brings into that House, are not within that Legacy. (t) And here observe, that what has been said as to the time of making the Testament, holds true likewise, and so is to be understood, as to the time of making a Codicil; the words whereof are chiefly to be referr'd to the time of the making thereof: Inasmuch, that in case by way of Codicil a man bequeath all his wearing Apparel to his Wife, and after some tract of time makes a Will and dies, no more Apparel doth pass by that Codicil (sup-

(m) Dict. l. si cognatis.

(n) Dict. l. si ita De aur. & arg. & Raph. Fulg. Conf. 99. nu. 10.

(o) Aurel. §. 1. de Liber. Leg. & Fulg. in Conf.

37.

(p) Paul. Castr. in l. cum stipulamur. nu. 3. de verb. obl. & Jaf. in l. si quis Sil. lud nu. 10. qd. quisq; jur.

(2) Auth. Col. 9.

(q) Alciat. Conf. 182. l. 9.

(r) Paul. Castr. Conf. 132. lib. 1. & Dec. Conf. 472. nu. 5.

(s) Oldr. Conf. 21. l. uxorem. §. Testam. & Ba'd. de Leg. 3. & l. medico in prin de aur. & arg.

(t) Bened. cap. Conf. 45. nu. 5. & Cor. Conf. 14. nu. 14. & Paris. Conf. 80. nu. 48. Vol. 2.

- posing it not contradicted by the Will) then the Testator had when he made that Codicil. (u) And yet notwithstanding also all this which hath been said, that the time of the making of the Testament is chiefly and specially to be referred to in the due Construction of Legacies, yet this is to be understood only when the words of the Testator speak of the time past or present; (w) Not when he speaks of the time to come by words of the Future Tense; (x) Nor when he speaks by such words of the present Tense as cannot take effect but for the Future. (y) Also when the Legacy is Universal under some name Appellative, and in its Nature Collective, as Herd, Flock, and the like; such a Legacy admitting of increase and decrease, the time (in that case) of the Testator's death is more to be inspected and considered than the time when he made the Testament. (z). So likewise, if the Testator willeth that such a one shall dispose of the Profits of his Estate, it shall be understood of such Profits thereof as were at the time of his death; because the word [*Profits*] is universal, and therefore not to be restrained only only to the time of the making of the Testament. (a). Or if he bequeath his money in the Bank, the profits thereof at the time of his death shall pass by this Legacy, (b) which (if you observe it) differs from that Case of money in the Bank aforesaid; also if the thing bequeathed be such as is in ordinary use, and by using is consumed, and another of like kind had instead thereof, that other shall pass by this Legacy; for in such case, not the time of making the Testament, but the time of the Testators death shall be considered. (c) Nor is the time of the Testaments making so considerable, when the Legacy is Conditional, for then the performance of the Condition will fall under chiefest Consideration. (d) Also the time of the Testators death, when it most tends to the upholding of the Testament, is more considerable than the time of the making thereof. (e) And therefore, though the words in the Testament be of the time past or present, yet in that the Will of the Testator holds free and good even to his last Breath: They shall also refer to the future in those things that depend on the meer Will of the Testator. (f) And if he bequeath indefinitely his Corn, it shall be understood all such as he hath at the time of his death. (g) Observe finally, That if the Testators words in a Bequest be doubtful whether they refer to the time past, or to the time to come, they shall be understood to relate unto the time that is to come. (b)
4. Where a Devise is made of Goods, if the Executor will not deliver the same to the Devisee, he hath no remedy by the Common Law; (i) but must have recourse against him by way of Citation out of the Ecclesiastical Court to appear before the Ordinary, to shew cause why he performeth not the Testator's Will; for
- (u) L. quædam ff. de ju. Codicil.
(w) Bart. in l. his verb. in prin. de Leg. 3.
(x) L. filiam de aur. & arg.
(y) Dist. 1. filiam & Rol. Val. Con. 39. nu. 12. Vo. 4.
(z) L. peculium in prin. de leg. 2. & l. grege. de leg. 1.
(a) Alciat. Conf. 173. nu. 4. l. 9.
(b) Jafin l. cum stipulamur n. 3. ad fin. de verb. oblig.
(c) Bart. in l. si ita nu. 8. de aur. & arg. in l. quid hæredem nu. 2. de Frit. Legat.
(d) L. mea res & l. cum qui. Glof. de cond. & de mon.
(e) Bart. in l. placet. nu. 2 de Lib. & posth.
(f) L. 3. in fin. de Alim.
(g) Bald. in Rab. C. de Verb. sign. nu. 4.
(h) Bart. in l. si ita legatum. de Cond. & dem.
(i) Terms of Law verb. Devise & Off. Exec. cap. 19. in prin.

for the Devisee may not take the Legacy and serve himself, but it must be delivered to him by the Executor. (k) So that the Legatary hath no remedy by the Common Law for any Legacy of Goods to him bequeathed, except (as the Law says) in case where some particular thing (as the Testator's Horse, Signet, or the like) is bequeathed: (l) Or if the Testator willeth that his Executor shall sell his Land, and pay such and such Legacies out of the proceed of the Sale thereof; in such case, the Legataries may sue at the Common Law for the same. And therefore if one devise, That his Executors shall sell his Lands, and with the moneys coming of the sale thereof, shall pay such and such Legacies or sums of money, in particular to such and such persons by name: This is not (as some affirm) such a Legacy as for which a Suit may be commenced in the Ecclesiastical Court: But for this (say they) every one that lays claim to a part therein, may take his Action of Accompt for it, after the sale thereof, against the Executors. (1) (1) Bullstr. 1. The which is contradicted by others, who affirm, that they must sue for such Legacies in the *Spiritual*, or Court of *Equity*; for that they may not have for this an Action of Accompt against the Executors at the *Common Law*. (2) Indeed regularly and most properly, Legacies are recoverable by Suit in the Court *Ecclesiastical*, though in some Cases they are also recoverable in *Chancery*. (3) And it is asserted, That if one devise his Lease-lands to his Son, except 100 l. to be paid out of it for Portions to his Daughters, that this is a good Legacy to them; and if his Son be Executor, the Daughters may sue him for the same in the *Spiritual* Court, or Court of *Equity*. (4) But if a Lessee for years devise his Term to his Executor for his life, the Remainder to *A. B.* for the residue of the Term, and the Executor entreat, and doth *Assent* to the Legacy, and then dieth, and after the Executor's Executor doth take the profits of the Land, and keep out the second Legatee: In this Case it seems, he may have an Action of Accompt against the Executor's Executor at the *Common Law* for the profits of the Land. (5) But if another doth claim by Deed of Gift, the Goods a Legatee doth sue for, this may be tried in the *Ecclesiastical* Court. (6) But if the Legacies be bequeathed to be paid out of Leases, and not out of Fee-simple Lands, then the Legatary may likewise sue in the *Ecclesiastical* Court for the same; (n) For though Legacies are to be sued for in that Court only, yet the Ordinary cannot take Cognizance of Free-hold devised. (o) And whereas it is said, That the Devisee may not take the Legacy and serve himself, but that it must be delivered to him by the Executor, yet the Law is otherwise in case Lands, or any Rents, or other profits to be taken out of Lands, be devised to a Man in Fee-simple, Fee-tail, for Life or

(l) B. o. tit.
Devise no. 36.
14. 27. 30.

(1) Bullstr. 1.
193.

(2) Trin 9 Jac.
Lover's Case.
Dyer 151. 852.
(3) Godb. 247.

(4) Bullstr. 1.
100. 151.

(5) Dyer 277.
(6) 37 H. 6. 4.
(m) Mich. 5. P. &
M. Dyer. fo. 151.
153. & Mich.
29 & 30 Eliz.
Co B. Germys's
Case. & Hob.
Rep. fo 265.
(n) Brown Rep.
1. part. fo. 34.

(o) Perk. Sect.
576. 579. & Dr.
& Stul. 2. c. 55.
& Cowell's
Inst. p. 145.

p) Perk. Sect. Years: For in these Cases, the Devisee may enter into, and take
 576, 577, &c. the thing devised without the Executors leave for so doing. (p)
 Cok. sup. Lit. III.

CHAP. II.

Of Devisors, and Devisees, or Legataries.

1. *Who may be a Devisor, or Devisee, or Legatary.*
2. *What Persons are incapable of being Legataries.*
3. *Whether an Infant in the Womb may be a Legatary; or a Feme Covert to her own Husband.*
4. *Whether Bastards may be Legataries.*

1. **R** Regularly every one that is qualified to make a Testament, may make a Devise of the same thing whereof he may make such Testament; and whosoever is disabled to the one, is disabled to the other also. And therefore Infants under the age of 21 years may not be Divisors of Land, nor of Goods under the age of 14, as to the Male, or under the age of 12 years as to the Female. (a) Nor may a Woman under Covert Baron devise her Lands to her own Husband, or to other with or without his consent. (b) Nor may any Ecclesiastical Person or Member of a Body Corporate devise the Lands or Goods which they have in right of the Church or Corporation. (c) So that every Devisor ought to be a person qualified to devise, and that both in respect of his person, and the thing devised; he must also have at the same time *Animus Testandi*, and the thing devised must be such as is devisable. And as to the Devisee or Legatary, all such by the Civil Law as are incapable of Inheritances and Goods, are excluded from being Legataries or Devisees, and indeed from being Executors. But every one by that Law that may be made an Heir or Executor, may also be a Legatary or Devisee: And as to any others, no Devise may be made: (d) Yet with this difference, that the Executor must be a person capable, both when the Testament is made, and when the Testator dies: (e) But it is sufficient for the Legatary that he be capable at the Testators death. (f) For where the Devisee of Land, or Legatary of Goods, or the Executor of a Will, shall happen to die before the Devisor or Testator, in that Case, both the Devise and Will are void; in so much, that neither the Heir of the one, nor Executor of the other, can lay any claim to the thing devised or bequeathed. (1) In-

(a) L. qua ætate ff. de Test. § præterea. Inst. quib. non est permis. fac. Test. l. si frat. C. qui test. fac. R. Testa. l. si frat. C. qui testa. fac. poss. & l. ult. C. Testa. Mil. & Perk. tit. Devise. fol. 97.
 (b) Cok. sup. Lit. 112. l. 61. Bro. Devise: 2.
 (c) Perk. Sect. 496.
 (d) Cod. de Hæred. Inst. l. 1.
 (e) ff. de Hæred. inst. l. si alien. §. de Extraneis & Inst. de hæ. qual. & dis. (f) ff. de donat. caus. mort. l. in mort. & de Cond. Et dem. l. cum qui & ff. de jur. Fisci. l. non intelligitur § quando.
 (1) Plow 345.

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deed at the Common Law it is otherwise; for there a Devise or Legacy may be given to all persons to whom a Grant may be made, save in some few Cases: And the Devise ought to be good and sufficient in Law at the time of the Testators death; therefore if a Man devise Lands to an Hospital, or the like, when there is none such at the Testators death, though afterwards made or erected, such Devise is null and void: The reason is, because Devises at Common Law are Purchases, and he that taketh Lands by Purchase, must be capable to take the same when it falleth to him by the Purchase. (g) Thus by the Common Law the Devisee ought to be capable at the time of the death of the Devisor; which holds also true by the Civil Law: Hence it is, that though a Man may not grant nor give Lands to his Wife during the Coverture, because they both are but one person in Law, yet by Custom heretofore he might, and by Statute now he may devise his Lands to his Wife to have in Fee-simple, or otherwise, because such Devise taketh not effect till the death of the Devisor, and then they are not one person. (h) So then, regularly, whosoever may be a Grantee, may also be a Devisee, or Legatee. (i)

2. For which reason a Commonalty not Incorporated by the King's Charter to purchase Lands, is incapable; therefore if a man devise Lands devisable in Fee to A. for life upon a certain Condition, the Remainder to certain men of a Fraternity, upon the same Condition, not Incorporated by the King's Charter, and enabled to purchase, this Remainder is void. (k) Therefore a Legacy given to an unlawful College, is void; for by that is meant all Companies, Societies, Fraternities, and other Assemblies not so constituted by the Prince, and therefore incapable of being Legataries. But generally a Devise may be good to any person or persons not specially rendred incapable by Law; for by the Civil and Ecclesiastical Law, the Legacy is void if it be given to an Heretic, Apostate, Traytor, Felon, persons Excommunicate, Out-lawed persons, Bastard, unlawful College as aforesaid, Libeller, Sodomite, manifest and notorious Usurer, except in some special Cases. And yet it seems, that a Devise of Lands to any such persons is good within the Statute of Wills. (l) Likewise an uncertain person can be no competent Legatary, no more than he is of being an Executor, inasmuch that if a man bequeath any thing to a person by a certain name, without other description of his person, and there be more than one of the same name known to the Testator: In this Case, neither of them shall be Legatary by reason of the uncertainty. (m) Hence it is, that Devises made in these words; viz. To his best Friend, or to his best Friends, are void Devises. (n) Or to his Son A. B. when he hath two Sons of the same name, unless you can help it by an Averment, which

(g) Perk. 97.
Sect. 505. &
9 H. 6. 23. & 2
El. 119 Pl. 18.
Dyer 13 Eliz.
303. Pl. 46. Dy.
& 300. Pl. 39.
& 5. f. 4. 6. p. 7.
Bil.
(h) Litt. 2. c. 10.
Sect. 8. 27. Aff. f.
Pl. 60. 24 H. 8.
Bro. Devise 34.
(i) Perk. Sect.
505, 510.

(k) Perk. 58.
Sect. 510. 49
E. 3. 3.

(l) Dyer. 303.
304. B R. curia.
Mich. 3 Jac.

(m) Sincerris
inst. de Legat.
Jo. An. Gem. &
Fran. in. c. si
pater de Test. 6.
(n) Cok. 6. 63.

- (1) Andeif. 2.12. which Son the Testator meant. And therefore if a Devise of Land be made unto two of the best men in the Parish of *D.* it is void for uncertainty. (1) So also Devise for life, the Remainder to his Issue having Sons and Daughters. (2) So if Lands be devised to a mans Issue, or where after a Devise of Lands to a Wife, and after her death to the Heirs males of any of his Sons, or the next of Kin; it is void for uncertainty. (3) Yet if a man devise Lands to his Son *William*, having two Sons of that name, this Devise is not totally void by reason of uncertainty, for an Averment may make it certain and good. (4) But persons named Alternatively or Disjunctively are not so uncertain, but may be admitted as Legataries: And therefore if the Testator bequeath 10 *l.* to *A.* or *B.* or to such or such a person, both of them shall have the Legacy equally betwixt them. (o) Because this word [*Or*] is in the favour of Testaments taken for [*And*,] (p) when it is so placed between two persons, either as to the appointing of Executors, or to the making of Legataries; unless it can be well proved, that the Testator did bear more affection to the one than to the other: (q) Or that he gave Authority to some other person of making the Election which of the two should be the Legatary: (r) Or when one of the persons is incapable of being a Legatary for any of the Reasons aforesaid. And if the Devisor doth bequeath to his Brother or his Children such a thing, saying, [I give to my Brother or his Children] in this Case upon the presumption of Affection, the Brother shall enjoy the Legacy during his life, and after him the Children shall be the Legataries: (s) But if it be devised to him and his Children, then are both the Parent and his Children equal and Joynt-Legataries. (t) And whereas it is formerly hinted, That an Heretick may not be a Legatary or Divisee, understand it of an Heretick that is such at the time of the Devisor's death; for it doth not prejudice the Legatary that he was an Heretick at the time of the making of the Testament, so as he be not one at the Testator's death. (u) Add unto this Ansbaptists; for the Law Civil and Canon excludes them also as incapable of being Legataries. (w) But a person Out-lawed, though depending the Out-lawry against him, he cannot sue for his Legacy. (x) Yet he is not so properly said to be altogether incapable of being a Legatary, as of being incapable of suing for his Legacy, unless the Out-lawry be reversed by some Error or Discontinuance in the Suit, or unless the party Out lawed were beyond the Seas at the time of the Out-lawry being pronounced: (y) Or unless there were some defect on omission of three Proclamations in such Cases by the Statute required: (z) Or unless his pardon be obtained, wherein the words of the Pardon ought diligently to be considered; (a) for by force
- (1) Andeif. 2.12.
(2) Cro. 1. 742.
Taylor and his Wife vers. Sawyer.
(3) Styles 250.
(4) Hob 32.
(o) L. cum quidam C. de Ver. sign & DD. ib.
(p) L. cum quid. ibid.
(q) Rip. in c. inter ceteros de Rescrip. Extr. nu. 54 Paris Conf. 2.1. Vol. 3.
Jul. clar. §. Test.
(r) 80. nu. 5.
(s) L. si Titio aut Scio. de Leg 2. §. 1. ult. §. cum quidam ff. de Reb. dub.
(t) L. cum pater §. 1. te ff. de Leg. 2. Bald. in c. 1. de eo qui sibi & hæred. suis lib. feud. Jul. clar. q. 80. nu. 5.
(u) Plowd. 345. Co. 1. 105 155. Perk. §. 508.
(v) L. non oportet. ff. de Leg 2. Peck. de Test. coning. l. 4. c. 21. Graf. Thef. com. Op § Int q. 28.
(w) L. ult. de Sac. Bapt. reit. c. Minus in rit. de hæ. l. ff. in prin.
(x) Fitzh. Abrid. tit. Admin. nu. 3.
(y) Terms of Law. Verb. ut legat.
(z) 31 Eliz c. 3. Co. Rep. l. 5. fo. 49. in Wirral's Case.

of the Out-lawry the Legacy is forfeited and confiscated. Likewise a person *Excommunicate* is not so Incapable of being a Legatary, as unadmissible by the Ordinary to commence any Suit for his Legacy during his persistency under such Sentence of Excommunication. (b)

3. If one devise to an Infant in his Mothers Womb, it is a good Devise; otherwise it is by Feoffment, Grant, or Gift: For in those Cases, there ought to be one of ability to take presently, or otherwise it is void. (c) Nor is it void by reason of uncertainty; for albeit the unborn are uncertain, it being not known whether or what manner the birth may be, yet it is not altogether uncertain, because the event will reduce it to a certainty: For which reason such persons uncertain initially, but certain eventually, may be appointed Executors. (1) And if one devise his Land to his Daughter and Heir apparent in Fee-simple, and the Wife of the Devisor be privily with Child of a Son, which is born after his death, then is the Devise become good, for that now she is not Heir to her Father. (d) Yet per *Coke & Dod.* if a man devise Land to an Infant in his Mothers Womb, and he be not born in the life-time of the Devisor, it is a void Devise. (2) Also a Feme Covert may be a competent Devisee or Legatary to her own Husband, as to such Lands, Goods or Chattels which he shall devise to her. (e)

4. Whereas Bastards, whether Bastards in simple Fornication, in Adultery, or in Incest, are without distinction incapable by the Civil Law of being Legataries, (f) yet understand this only, where they are made Executors or Legataries to their own natural Parents, for to any others they may be Executors or Legataries. (g) Also by the Ecclesiastical Laws they are capable of being Legataries even to their Adulterous or Incestuous Parents, so far as is needful or necessary for their convenient sustention, or for their competent alimentation and relief. (h) Therefore have the Laws and Statutes of this Realm provided for the same purpose; (i) which do also permit every man, as well by Deed executed in his life-time, (k) as by his Last-Will and Testament to be executed after his death, (l) to give or devise to any of their Bastards without distinction, all their Lands, Tenements and Hereditaments without restraint. And by the Civil Law the lawful Children of Bastards may be Legataries to the Adulterous Grand father, (m) but not to the Incestuous Grand father. (n) In like manner by

(b) Phil. Franc. in Rub. de Test. l. 6. nu. 32. & Graff. Thef. Com. Opt. 5. Instit. q. 4. & Bald. lid. quod pauperib. C. de Ep. & Cler. nu. 6.

(c) Terms of Law. verb. Devise.

(1) L. uter ex fratribus de cond. Inst. & l. 2. § si quis ita. De bon. poss. & l. quidam relegatus. De Reb. Dab & Gomez. Var. Resol. tom. 2. c. 11. vers. septima & c.

(d) Fitzh. tit. Affize 27.

(2) Mich. 12 Jac. B. R. Simpson & Southwood. Ent. Hill. 7 Jac. rot. 679. Rol. Rep. (e) Mich. 19 Jac. cur B. R. Crump vers Bodie.

(f) Covar. de spons. par. 2. c. 8. § 5. n. 15. 16. 17. & Jul. clar. l. 5. § Fornic. & § Incest. & Aut. ex complex. c. de incest. nupt. & DD. ibid. (g) Gloss. in Auth. quib. mod. na. et sic. sui. § fin. Clar.

§ Test. q. 31. n. 4. (h) C. cum haberes de eo. qui dux. in ux. q. pol. per Adulr. & l. legatis ff. de aliment. & Decio Neap. 161. n. 2. (i) 13 Ehz cap. 3. (k) Perk. tit. Grant. f. 11. & Bract. l. 2. c. 7. (l) Perk. tit. Devise. f. 91. (m) Jas in l. hereditas c. his quib. ut indign. n. 7, 8. (n) Bal. ubi quis incestus c. de Incest. nup.

- the Common Law, *Bastards* may be as able Executors as any other; (3) but it is otherwise of Bastards begotten in Incest: (4) And whoever is for that or any other cause of disability incapable of an Executorship at the time of the Testators death, is (as to that Testator) incapable for ever; Understand it of an absolute incapacity at the time when the Office of Executorship should be assumed.
- (o) Mich. 4 Ed. 6. Anderf. Rep. Ca. 82. (o) If a man possessed of Goods, devises the same to his Son when he shall attain to the age of 21 years, and in case the Son die before that age, then one of his Daughters to have the said Goods, and the Son die before the said age. The Question is, Whether the Daughter shall have the Goods immediately upon and after the Sons death? or, Whether she shall stay till the time when the Son should have been of that age, in case he had so long lived? The Opinion of all the Justices was, That she shall have the Goods immediately upon the Sons death.
- (p) Hill. 4 Ed. 6. Mo. Rep. n. 39. (p) A man had Issue a Bastard, and after inter-marries with the same Woman by whom he had that Bastard, and hath Issue two Sons by her, and then devised all his Goods to his Children. It is by every one supposed, That the Bastard shall have nothing, for that he is *nullius Filius*. In that Case it is clear, that a Bastard shall not take by a Grant. But Q. as to a Devise. And if the Mother of the Bastard make such a Devise; it is clear, That the Bastard shall take thereby, because he is certainly known to be the Child of his Mother.

CHAP. III.

Of Words and Expressions sufficient for Legacies.

1. *Any words, whereby the Testators mind or meaning is express'd or implied, are sufficient for Legacies.*
2. *Legacies are not destroyed by words impertinently used by the Testator in the Bequest.*
3. *That words carrying a false Demonstration, shall not vitiate and null the Legacy ; also how this is to be understood.*
4. *Whether a Legacy may be bequeathed only by the Testators Signs, Becks, or Nods, when he can speak articulately.*
5. *Whether a Legacy shall pass by words only Implicatory of a contrary condition.*
6. *In point of Legacies the Testators meaning express'd by Words, is more to be heeded, than when implied by Deeds.*
7. *The Testators words by Implication may be such, as may make the Legacy greater casually, than he plainly express'd Originally.*

1. **I**F a man in his Last-Will and Testament says, I do give, bequeath, devise, order or appoint to be paid, given or delivered ; or, My Will, Pleasure or Desire is, That he shall have or receive, or keep, or retain ; or, I dispose, or assign, or leave such a thing to such a one ; or, Let such a person have such a thing ; or any other words whereby the Testators mind or meaning of bequeathing is expressed, or sufficiently implied, shall be significant enough whereby the Legacy shall pass, provided no other legal Obstacle stand in the way ; because it is not in Last-Wills and Testaments as in Deeds ; for in Deeds the words do fall under a stricter Examination than the intention, or the mind ; but in Wills and Testaments the Testators mind and meaning is more valuable, and of more efficacy in Construction than his words, so long as the Interpretation of his mind and meaning hold a Conformity with his words, nor is oppugned by any other part of his Last-Will and Testament. For a Testator is not limited to any form of words or phrases, in declaring his meaning and intent, so as they be but significant enough to make a discovery thereof, without repugnancy to any other part of his Will.

2. A Testator in making a Bequest, may possibly speak such words as may be very impertinent, yea, and in themselves altogether untrue, and yet the Legacy not destroyed : As thus ; *viz.* If I give and bequeath my Field *Long-acre* to *A.B.* beyond, above, O o besides,

besides, more than, or over and above the *Black-Horse*, which I had of him in consideration of the Ten pounds which he owed me : This *Long-acre* is a good Devise or Legacy to *A. B.* albeit the Testator never had any such *Black-Horse* of him, and although he never owed him any such Ten pounds ; the reason is, because the said words, [*Above, Beyond, &c.*] in this sense, and in this case are inclusive, and are so to be understood and interpreted. (a) So that words merely impertinent or superfluous, shall not prejudice the Legacy, unless there be other Circumstances therewith, that can induce a violent presumption or proof of Insanity of mind in the Testator.

(a) Surd. Decif. 285 & Aret. in l. qui ita ff. de Dot. præleg. & Bart. ibid. Man. tic. l. 9 tit. 3 n. 12. & Menoch. de Præsump. lib. 4. præf. 145 & Perigr. de Fidei Commiss. art. 16. nu. 18.

3. A false Demonstration shall not vitiate a Legacy : Inasmuch that if the Testator, who hath bequeathed nothing to *A. B.* do say, That out of the Hundred pounds which I have bequeathed to *A. B.* I do give Fifty to *C. D.* If in this Case it be questioned, Whether any thing be due to *A. B.*? and, What is due to *C. D.* The Answer is, That Fifty pounds are due to *C. D.* although nothing be here bequeathed to *A. B.* because a Legacy shall not be vitiated or nulled merely by a false Demonstration : But to *A. B.* nothing is due ; because it was not the Testator's mind to bequeath any thing to him, but rather to lessen or diminish it, if any thing had been given to him : For a Diminution, Ademption, or taking from in such case hath its operation to evince by how much the less, not by how much the more the Legacy is due. (b) But if the Testator say, I bequeath 100 l. to *A. B.* beside my Field *Long-acre*. In this Case *Long-acre* is presumed to be bequeathed as well as the Hundred pounds. And whereas it is here said, That a false Demonstration doth not vitiate or make void the Legacy : Understand it thus, that is, if the Demonstration be altogether and totally false : But if it be false only in part, then the Legacy is void only for that part, and it may hold for another part. (c) To this may be added this Case, If the Testator say, I bequeath to *A. B.* the Hundred pounds which I have in my Chest ; there is nothing due to *A. B.* and the Legacy is void, if it be not in his Chest ; (d) because he that so says, doth not bequeath a Hundred pounds simply, but the Hundred pounds in his Chest : And these words, [which are in his Chest,] do demonstrate, that the Testator's meaning was to bequeath rather by way of certainty, as to the Species or Corpus, than as to the Quantity.

(b) L. 14. de admif. leg.

(c) Rebuff. ad l. Appellatione verif. Tertio. de verb. Sign.

(d) L. si Servus §. qui quing; de Leg. 1.

(e) Menoch. de Præsump. l. 4. Præsump. 105. nu. 2.

(f) Mantica. l. 6. tit. 4. cap. 1.

4- If the Testator say, I depute such a thing to *A. B.* or I assign such a thing to *C. D.* this is a good Bequest or Legacy ; (e) Yet withal here observe, That a Legacy may be given or bequeathed only by Signs, or Becks, or Nods, by the Head, Hands or Eyes. (f) But this is more clear and less dubitable, when a Legacy in such manner is left by a Testator, who by reason of the violence and surprise

prize of some Disease, is deprived of his speech ; (g) at least of speaking articulately, though not deprived of his speech totally. *(b)* The greatest doubt is concerning him, who though he can speak articulately, yet doth bequeath by Signs or Nods ; for some are of opinion, That such cannot dispose of a Legacy in that manner : *(i)* But this is commonly rejected as the more unsound Opinion. *(k)* Now a Legacy is then understood to be left in this case, when the Testator being asked by some one, whether he will leave a Hundred pounds, or such a thing to himself or some other, doth not answer to the Question, but by Signs or by Nodding his Head, shewing a pleased or displeased Countenance, or by other motion of the body, doth plainly discover his Will and Pleasure therein, with such clearness, that the contrary cannot rationally be inferred therefrom : For the Law takes a more exact notice of the Testators meaning, than of his words ; and therefore is satisfied, if that meaning and intent may be known, though without words.

5. Suppose the Testator speak only after this manner ; *viz.* If my Son *A. B.* marry with *C. D.* let not my Executor give him a Hundred pounds ; whether from these words by the contrary sense is the Legacy of a Hundred pounds understood to be left to his Son *A. B.* under the contrary Condition ; *viz.* If he do not marry with *C. D.* This is held in the Affirmative. *(l)* Yet this would not hold if he should appoint an Executor after this manner, and say, If my Son *A. B.* marry with *C. D.* let him not be my Executor, or one of my Executors : The reason is, because an Executor may not be instituted, nor the Office of an Executor inferred only by Conjecturals. *(m)* Again, a Legacy taken away under a Condition, is not only from thence understood to be given under the contrary Condition ; because a Legacy due only under a Condition, may not be argued or inferred from a contrary sense by force of a bare Ademption, but by force of a Legacy formerly so bequeathed, as may not be understood to be taken away though the Condition fails, but only when the Condition takes place or effect. *(n)*

6. In Cases doubtful touching Legacies, and the Testators mind or meaning as to the same, recourse must be had rather to what he doth express by words, than what he doth imply by any Acts or Deeds, when there appears any discrepancy between them. Hence suppose a Parent having divers Sons and Daughters, doth appoint them all his Executors, and to his eldest Daughter doth deliver all his Keys and his Signet Ring, which he commonly used : And having delivered these to her to keep, doth withal order and assign, That his said Daughters, Son or Servant (be it expressly either) shall have such Apparel, Moneys, or other things, as

g. Covar cap.
cum tibi lib 2.
var. Resolut.
(h) Marth ad
Guid. Pap. quest.
459.
(i) Additiona-
tor. ad Gomez.
var. Resolut.
tom. 1. c. 12. n. 2.
(k) Marth ad
dict. quest. 459.
Gomez dict.
c. 12. n. 2.
(l) Mantich. 3.
tit. 17.
(m) Mantich. 4.
tit. 17. nu. 2.
(n) Mantich. ib.

(o) L. cum pater
§. pater plurib.
ff de Legat. 2.

he hath in his care, and under his custody : Whether in this Case doth the Parent seem to bequeath to that eldest Daughter whatsoever is under Lock, shut up, or sealed. The Answer is in the Negative. (o)

(p) L. ult. §. 1. de
Dol. Excep. &
Roman. Singu.
§ 35.

7. Lastly, The Testators words may possibly be such, and carry in them such a sense by direct Implication, as whereby the Legacy may casually become greater than at first was apprehensively express'd by him. For Explanation whereof, add to the former this one memorable Case more : Suppose a Legacy be given by a Testator to the Son of him who is indebted to the Testator ; adding withal these words, *viz. I should or I would leave him more, if his Father had paid me what he owes me.* In this Case it is held, That if afterwards that Son happens to be his Fathers Executor, he is by these words freed from that Debt which his Father owed to the Testator. (p)

(q) Hill. 14 Jac.
B.R. per Cur.
Roll. Abridgm.
tit. Execuc.
Lit. X.

(q) If there be a Devise of a Legacy to one and his Assigns, though the Devisee die before payment, yet his Administrator shall have it as his Assign. The reason seems clear ; *viz.* That although the Legatary dies before payment, who was principal in the Bequest, yet the duty remains, because it was not limited to the person of the Legatee, but expressly extended to his Assigns.

(r) Mich. 24 Eliz.
Weast's Case.
Moo Rep. nu.
314. Stat. 34 H.
8. 3. of Wills.
Moo. Caf 299.

(r) *Amerjam* said to *Moore*, That *Popbam*, now Chief Justice of *England*, held in his Readings, That if one by a Letter express his Will for the disposal of his Lands, it is sufficient : For it was the Case of one *Weast*, who went beyond Sea, and wrote such a Letter, wherein he Will'd, That his Lands should go in such manner. And it was held a Good Devise.

C H A P. IV.

Of Conditions and their Resemblancies incident unto Legacies.

1. *A false necessary Demonstration doth vitiate a Legacy, but not a false superfluous Demonstration.*
2. *The Parity of Operation between a false Cause, and a false Demonstration; and, Whether a false Cause doth vitiate a Legacy?*
3. *Whether a false Condition doth vitiate a Legacy?*
4. *The difference between Modus and Conditio.*
5. *In what Cases the word [If] doth not amount to a Condition.*

1. **W**HAT *Conditio* is, or by what words it is express'd or implied, with the several kinds thereof incident to Testaments, hath been formerly hinted at. (a) And as a Condition relates to Legacies, it is such a Quality added or annexed to the Devise or Legacy, as whereby the effect thereof is suspended, till some future event, whereon it depends, doth come to pass. For in the bequeathing of Legacies, as well as in the appointing of Executors, there is for the most part either that which the Law calls *Conditio*, or *Modus*, or *Causa*, or *Demonstratio*: The two former whereof, refer to the time to come; the two latter, to the time present, or the time past. And a *Demonstratio* is instead of the name of persons or things, and is nothing else but a Note and Designation, whereby either the person of the Legatary, or the Legacy it self is demonstrated: For which reason, a Legacy is not rendred void or null, meerly by bequeathing it by a false name, or through a meer erroneous Appellation only demonstrative, so as the thing bequeathed be certain, and person of the Legatary not uncertain. (b) Understand this, when the Testators error is only in the *Proper* name of the thing bequeathed, and not in the name *Appellative*: As, having a Meadow commonly called *Barr's* Meadow, which he intends to devise, doth devise it by the name of *Long's* Meadow; this Devise, notwithstanding such error, is good, Otherwise it is, in case the error be in the name *Appellative* of the thing bequeathed; as, intending to devise a Meadow, doth devise his Orchard, or his Vineyard, though that Meadow may be converted to an Orchard, or a Vineyard: The reason of the difference is, Because the names Appellative of things are immutable, as being ever the same from the beginning:

(a) *Supra* par. 1.
cap. 13. 14.

(b) §. *Siquidem*
Inst. de Legatis

(1) *ff. de Legat.*
l. 1. §. si quis in
fund. & Gloss. ib.
 (c) *§. Falsa*
Inst. ibid.

(d) *L. Demon-*
stratio de Con-
dit. & Demon-

(e) *Pap. Not. 1.*
tit. de Leg. verif.
de Parcil. & c.

(i) *Rebuff. de*
edilat. art. 2. gl. 2.
nu. 12.

ginning : But meer proper Names are capable of, and subject unto various alterations. (1) So likewise is it in case of a false Demonstration, which doth no more vitiate the Legacy, than if it were given by a wrong name: (c) As, if the Testator say, I bequeath *Bucephalus* my black Horse of my own Breed, or which was a Foal of my white Mare : This Legacy is good, though he were not of his own Breed, or a Colt or Foal of his white Mare. But understand this only when the Demonstration is too full or superfluous, and not of a Demonstration which is no more than necessary, and which respects the very substance of the thing bequeathed. Now a Demonstration is said to be too full and superfluous, when it is added to a thing certain and sufficiently demonstrated before, and which would plainly enough appear without any such addition of that Demonstration ; and of such Demonstrations only it must be understood what is here said, *viz.* That a false Demonstration doth not vitiate the Legacy. And as a superfluous Demonstration that is in it self false, doth not vitiate the Legacy, when it is such a false Demonstration of the thing bequeathed ; so neither when it is added to the person of the Legatary. (d) And here note, That a Demonstration hath more Energy, Force and Operation in it than a meer name: And therefore if the Testator hath two Daughters, the one married at *London*, *viz. A. B.* and the other married at *York*, *viz. C. D.* doth say, That I bequeath 100 *l.* to *C. D.* my Daughter, which is married at *London* : In this Case, the Legacy of the 100 *l.* is due to *A. B.* (e) In like manner, a Demonstration by the Quality is of more force than that which is by the Confines, Bounds or Limits of Place : Therefore if a Testator doth bequeath his Cherry-Garden, being in such a place, nigh such Neighbors, it is a good Legacy, and due, albeit it be not in that place, but in another. (f) So that it is not a false superfluous, but a false necessary Demonstration that doth vitiate the Legacy, and that which respects the very substance of the thing it self bequeathed: For from thence it is, that (as in the last precedent Chapter) if the Testator say, I bequeath Ten pounds which I have in my Chest unto *A. B.* nothing is due to him if it be not in his Chest ; because in this Case the Demonstration is inherent to the very body or substance of the thing it self bequeathed ; which being limited by the Testator, to a certain place, if it be not there, the Law will presume it to be no where : For albeit regularly a meer Demonstration hath not that efficacy in Law as a Condition, differing each from other, as far as a thing that is done, doth from that which is to be done ; yet if the Demonstration be such, as without which neither the meaning of the Devisor, nor the thing devised, can be intelligible, and such Demonstration be altogether erroneous, the Bequest is void.

2. What hath hitherto been said of a *false Demonstration*, the same in Law may be applied to a *false Cause*, or a *false Ground* or *Reason*: For as a Legacy is not vitiated by a superfluous false Demonstration; so neither is it by the addition of a false Cause or Reason. (g) And as by a Demonstration it is signified to whom and what is bequeathed: So by the Cause or Reason it is shewed why or wherefore it is bequeathed. Hence it follows, that if the Testator say, I bequeath 100 l. to A. B. for that the Structure or Building of his House was prosecuted and went forward, or the like: In this Case the Legacy is due, though that Cause were not true; (h) yea, whether the Testator did or did not know the Cause to be false; (i) unless the Cause be such as is inherent with, and taken for the very substance of the Legacy itself: In which Case a Bequest or Legacy is void by a false Cause; or unless the Testator declares the Cause conditionally, that is, in the same manner as a Condition uses to be declared, as by the word [*If*.] As when the Testator says, I bequeath a Hundred pounds to A. B. if he hath taken care of my business in London: For every Cause, though it be conditionally spoken, or after the manner of a Condition, yet it refers to the time past; whereas a Condition refers to the time to come. Therefore it is very material to consider, whether the Testator doth express himself causatively, as by the word [*Because*,] or *Conditionally*, as by the word [*If*.] For if conditionally, and the Condition be under a Falsity, then the Legacy is not due; but it may be otherwise though the Cause be false, unless it can be proved, that the intention of the Testator was otherwise: Now the mind or the intention of the Testator may be proved either truly or presumptively; truly, if the Testator fully so express himself; presumptively, when the Cause doth respect or refer to Consanguinity or Affinity: As, when the Testator says, I bequeath a Hundred pounds to A. B. because he is my Brother or Kinsman. (k) Others in this point of a false Cause, do distinguish between an impulsive Cause, and the final Cause, and conclude thus, viz. That the impulsive Cause doth not vitiate the Legacy, but that a final Cause doth. (l) In all which Variations and Doubts, the Testators mind and meaning, so far as is rationally colligible, must turn the Scale. To conclude therefore this point: If the Testator says, I do bequeath a Hundred pounds, because he lent me a Hundred pounds, this Legacy holds not if the Cause be false: Yet if he says, I do bequeath the Hundred pounds to A. B. which he lent me; this Legacy is good, though nothing were lent him. (m)

3. Again, it may be a Question, Whether a *false Condition* doth vitiate a Legacy? Some are of opinion, That it doth vitiate a Legacy: (n) As if the Testator say, I bequeath a Hundred pounds

(g) §. longe.
Inst. de legat.

(h) Rebuffad l.
27. vers. ideo.
De Verb. Sign.
(i) Gomez. Var.
Resol. in Tom. 1.
c. 12. n. 76.

(k) Gomez. Var.
Resol. Tom. 1.
c. 12. n. 76.

(l) Menoch. de
Præsumpt. l. 2.
par. 14 & Gal-
gan. de Cond.
par. 2. c. 4 q. 1. 2.

(m) Ib. Menoch.
Præsump 24.

(n) Leon. Gal-
gan. de Cond.
par. 1. c. 5. n. 26.

to *A. B.* if he pay to *C. D.* what I owe him; when the Testator owes nothing at all to *C. D.* which some will understand only when the Condition is originally false and *ab initio*; for if it be false only *ex post facto*, as if the Testator did owe him indeed, or was indebted to him a sum of money, but paid it to him after he had made his Testament, the Legacy is notwithstanding due, say some, but contrary to Truth and Law. (o) So that the Condition which is false *ab initio*, is held as an impossible Condition, and therefore voids not the Legacy: And on the other side, that Condition which is false *ex post facto*, is held as defective, and for that reason doth not void or null the Legacy. (p) Understand this of the deficiency only of Conditions, improperly so called, that are false *ex post facto*: For though *Conditio* properly looks forward unto some thing that is to be done, or to come to pass; as *Demonstratio* respects only some thing present, or with a retrospect refers to some thing past, yet the Condition, be it false, if it be only *ex post facto* so, and the Testator were ignorant thereof, it may well be doubted, how that Legacy, according to the intent of the Testator, can become due to him, who cannot perform a Condition which the Testator meant he should perform, or otherwise had not bequeathed it to him; it not being a defective Condition in the Testators meaning, which ought to regulate the disposition.

4. *Modus* and *Conditio* are distinguished from each other by certain Notes, Signs, or Forms of Words or Speech; as thus, The common Note or Word by which a Condition is usually known, is by the word [*If,*] and that whereby *Modus* is commonly conceived and known, is by the words [*That,* or *So as.*] Therefore if the Testator say, I bequeath Ten pounds to *A. B.* so as he give Five pounds to *C. D.* This is only *Modus.* (q) But if he had said, I bequeath Ten pounds to *A. B.* if he give Five pounds to *C. D.* then it had been a Condition. (r) Yea, though the Testator add a Condition to the *Modus*, yet the word [*That*] implies a *Modus*, not a Condition: As thus, I bequeath Ten pounds to *A. B.* on Condition that he give Five pounds to *C. D.* (s) Yet in some Cases the word [*That*] may rather imply a Condition than a *Modus*, especially if it can be proved, that the Testators meaning was, That the Legatary should fulfil what is enjoyn'd him, before he should enjoy the Legacy. Hence it is, that it may be judged from the Method and Order of the writing of the words themselves, whether it be a *Modus*, or a Condition: For if the Testator doth first enjoyn a charge or a burthen before he doth make the Disposition, or give the Legacy, then it is to be understood as a Condition: As thus, If the Testator say, That let *A. B.* give my Son *C. D.* Five hundred pounds, and take all my Goods; or let

(o) L. cum tale.
§. pen. de Cond.
& Dæmon.

(p) Cujas. indi. c.
§. pen.

(q) L. utilitas.
§. i. de manum.
test.

(r) L. si ita. ibid.
& dist. l. utilit.
ibid.

(s) Gomez. Var.
Resol. 10. l. c. 12.

n. 70. & Grassus.

§ legat. n. q.
49 § 8. & Valq.

de success. prog.
l. 3. §. 27. nu.

15. & Mantic.
l. 10. tit. 5. nu.

15, 16.

let him give him Five hundred pounds and be my Executor. It is otherwise when a Charge is joyned with a Grant or Disposition, than in it self is already perfect and compleat : As thus, If the Testator say, I make or appoint *A. B.* my Executor under this Condition, that he succeed not in; or possess himself of my Estate, till my Legacies be paid. (t) And this is a current Rule, That when-
 ever it may clearly appear, that it was the Testators intent and meaning to make a *Condition*, it shall be understood as a *Condition*, though he used words that are properly *Modal*; and whenever it can likewise be proved, that his meaning was to make a *Modus*, it shall be understood only as *Modal*, though he used words that are properly conditional. (u) Yea, the Law lays a considerable weight upon the very method of the Testators words, or the loco-motive manner of phrasing his mind, whereby to infer, Whether he intended the disposition he makes, should be *Conditional*, or only *Modal*. (1) And therefore if the Testator doth first enjoyn the Legatary to do a thing, before he is to receive the Legacy; or appoints a duty incumbent, before he makes the Disposition, it is in that case understood as a *Condition*: (2) As if the Testator say, *I Will that A. B. pay my Wife 100 l. and be my Executor.* Otherwise it is, in case the Testator doth joyn with, or add an incumbent duty unto a Disposition already made and perfect: As if he should say, *I appoint A. B. my Executor on this Condition, that he enter not upon the residue of my Estate, till all my Debts and Legacies be paid.* This Executorship is appointed not *Conditionally*, but only *Modally*.

5. There are certain Cases wherein the word [*If*] doth not amount to a *Condition*; one is, when the *Condition* doth refer to the time present or past. (w) As if I say, If *A. B.* hath made me his Executor, let *C. D.* be my Executor; or if *A. B.* hath given me a Hundred pound, let *C. D.* have a Hundred pound: for this kind or manner of speech being then presently *ab initio*, either true or false, doth not suspend the Executorship or Legacy, but hath its operation *ad statum*, either to their Confirmation or Annulment. (x) Another Case is, when the Executors or Legataries are made in this manner; viz. Let *A. B.* and *C. D.* be my Executors as to the parts which I shall appoint or assign them; or let them be my Executors, if I assign them any parts; or let them be my Legataries as to the parts which I shall appoint, or if I assign them any parts: In this Case it is held, that they are not appointed Executors or Legataries under a *Condition*, but that such making Executors or Legataries is valid and good, albeit the Testator should afterwards assign them no parts: The reason is, because such a kind of speech doth admit a double sense or interpretation, and is as if the Testator had added, And if I

(t) Menoch. Cont. l. 1. l. 1.
 (u) L. in condi-
 tio ibi § 1. de
 Cond. & De-
 mon. & l. 2. c. de
 his quæ pœn.
 nom
 (1) Galgancet. de
 Cont. l. 1. l. 1.
 (2) Pu. 2. c. 6 q. 3.
 (2) Galg. ibi. &
 Gu. Pap. q. 15.
 n. 2. Pergr. de
 fideic. l. 1. n.
 113. Alex. l. 1.
 Confil. 119. &
 102. & Man-
 tual. l. 1. c. 1. §.
 nu. 15. 16.

(w) L. mutuo.
 § ff. de Tutul.

(x) §. Conditio-
 nes. Inst. de
 Verb. Oblig.

assign no parts, let them be my Executors or Legataries in equal parts. (y) Several other instances might be given to shew wherein the word [*If*] doth not make a Condition : But these may suffice our purpose in this Abridgment, being not to insist longer on Instances than what are sufficient for Illustration. Yet this by the way ; viz. That regularly in Last Wills and Testaments, the word [*If*] carries the force of a Condition, be it joyn'd either to the Disposition or the Execution thereof ; (3) and shall hold as such, not only when the future event is altogether uncertain ; but also if it be only uncertain when it will come to pass, albeit it is most certain that it will come to pass.

(y) Intrigolus.
de Substit. in
Cent. 3. q. 88.
nu. 18.

CHAP. V.

Of the several marks and kinds of Conditions, and Questions in Law touching the same.

1. *This subject of Conditions very voluminous in the Law.*
2. *The several Words and Phrases of Speech denoting Conditions.*
3. *The divers kinds of Conditions.*
4. *Several Questions in Law touching Conditions, resolved by Mr. Swinborne, out of others learned in the Law.*

THIS subject of Conditions, with their several Marks, Notes, Signs, Differences and Variations, with their Amplifications and Restrictions, or Limitations, both as to the appointing of Executors, and bequeathing of Legacies, is a Field so large in the Law, as indeed would of it self require a very large Volume to reduce them all, though but to a *Compendium*, indeed too vast a Body to be compriz'd in such an Abridgment as this is : You may well guess that this is a provident Truth to obviate overcurious Expectations, rather than any lazy Excuse to save labour, if you seriously consider by what variety of Words and Phrases ; by what multiplicity of Sentences, Constructions and Interpretations ; and in what innumerable cases Conditions are made.

2. As when and in what Case a Condition may be made by these words following ; [*If, So as, Provided, To the intent, On Condition, To the purpose, That, When, Whereas, In case, So that, To, After, Afterwards, After that, So long as, Until, Who, Which, Whensoever, Whosoever, What person, Which person, Except, Otherwise, Where ;*] with many others. As also if you consider in what Cases a Condition referring to the time present or past may improperly be a Condition ; also, when an Argument

is.

is drawn from the contrary sense, may have place in Conditions: Also what the difference is between [If] and [When,] and in what Cases the Disjunctive word [Or,] placed between two Phrases of time to come, shall disjunctively infer a Condition; also when such a Conjunction Copulative, (as noting one thing necessarily to precede, another shall follow) doth make a Condition: Also, Whether Adverbs of Negation make a Condition, or only a *Modus*? And, Whether every Adverb that suspends the Disposition till some future event, doth make a Condition? Also in what Cases and when Prepositions do make a Condition; and in what Cases Pronouns do the same: Likewise when Relatives, as to Substance, Quantity, Quality or Number do make Conditions; also by what words, and when are Tacite Conditions, and how many ways such may be made: And whether a Condition by Relatives be not a Tacite Condition; also whether a Condition may not be made by Participles spoken Absolutely: And although Participles of the time present, or the time past, do not make a Condition, yet whether Participles of the future Sense may not make a Condition; also when and in what Cases Gerunds may make a Condition: As also, in what Cases the bare mention of a Condition doth not always make the Disposition conditional. *Cum multis aliis.*

3. Of Conditions there are many kinds, whereof some be necessary, some impossible; some indifferent or possible: The two former are void *ab initio*. Of necessary Conditions, some are termed so in respect of Fact, some in respect of Law. Impossible Conditions are such either in respect of Nature, or of Law, or of the Person enjoyn'd, or in respect of Contrariety, Repugnancy, Perplexity, or Incompatibility. And of Possible Conditions, some are Arbitrary, some Casual, and some Mixt. Of Possible Conditions some consist in Chancing, some in Giving, some in Doing, some Certain, some Uncertain, respecting either Time, or Place, or Persons, or Things; whereof also some are Affirmative, some Negative. But whatever the Condition be, that is not void in Law, is to be observed as a Law by him on whom it is enjoyn'd, or otherwise take its due effect, e'er the Disposition made under the Qualification thereof, can have any.

4. There are also in the Law almost innumerable Questions relating to this Subject of Conditions: To enumerate some of them; as, Whether impossible or dishonest Conditions do make the Disposition conditional? Whether necessary Conditions make the Disposition conditional? What are the various effects of Conditions? Whether Necessary, Impossible, or Unlawful Conditions do suspend the effect of the Disposition? Whether Conditions partly certain, partly uncertain, do suspend the effect of

the Disposition? Whether impossible Conditions which the Testator supposed to be possible, do suspend the effect of the Disposition? Whether Conditions that are very hard and almost impossible, do suspend the effect of the Disposition? Whether it be not sufficient for an Executor or Legatary to accomplish the Condition by some equivalent means, though not in the punctual and precise manner prescribed by the Testator? Whether Conditions at first possible, but afterwards becoming impossible, do hinder the effect of the Disposition? Whether Conditions impossible by reason of Repugnancy, Contrariety, Perplexity, or Incompatibility, do not make void the Disposition? Whether the Condition be not in Law held as accomplished, when it is not the Executors or the Legataries fault wherefore it is not performed? Whether when the Condition is Negative, the Legatary may not have his Legacy, entering first into caution for Restitution thereof, in case such Condition be not kept and performed? Whether every possible Condition ought to be observed precisely? Whether and in what cases the Legatary may obtain his Legacy, before the accomplishment of the Condition? Whether it be sufficient that the Condition was once performed, though it doth not continue so? Within what time the Condition may or ought to be performed, when no certain time is limited by the Testator? In what sense that common Condition, [*If he die without Issue*] is to be understood, and when it may be said to be accomplished? Whether the natural, as well as the lawful Issue be to be understood by them words? Whether that Condition be accomplished if he die, leaving his Wife with Child, which is afterwards born? Or whether in case he hath a Child dies, but before his Father? Whether there be any difference, and what that difference is, betwixt this Condition, [*If he die without Issue,*] and this, [*If he have no Issue?*] What the Law is, in case the Issue be born dead? or dieth as it is born? What course to be observed in Legacies, where more than one are born at the same birth? Whether the Condition of payment to be made to an Infant, be performed by payment made to his Guardian? Whether he in whose favour a Condition is made, may not consent to other means of performing the Condition than was prescribed by the Testator? Whether a precise performance of a Condition be not understood only of voluntary Conditions, and not of necessary Conditions? Whether such precise performance of a Condition be requisite, when the Legacy is in favour of the Testators Children, or *ad pios usus*? Whether the Condition may be performed by another person than him that is nominated in the Condition? Whether casual Conditions may in any case be reputed as accomplished, before the event? In what cases casual Conditions be reputed as accomplished,

plished, albeit the same be not so indeed? Whether a Condition doth prejudice the Executor or Legatary, when the Testator himself doth hinder the performance thereof? Whether a Condition doth prejudice a Legatary, when the performance thereof is obstructed by a third person? Whether the accomplishment of a Condition hindred by casual means, shall prejudice the Legatary? In what cases an affirmative Condition doth imply a Negative? What the Law requires of the Legatary, as to Bond or the like, when the Condition is not performable during Life? Whether a Negative Condition is said to be accomplished, when it cannot be infringed? What if the party be already married, to whom any thing is bequeathed conditionally, [*If he should marry?*] Whether the Condition shall be reputed as accomplished, if the Legatary were once willing, and afterwards becomes unwilling? What are captious Conditions, and how they shall not prejudice the Legatary? Whether a Legacy given with a Condition dependent on the will of another than the Testator himself, be not a void Bequest? What the difference in Law is, between the Testators referring his Will to the absolute, and to the limited Will of another? Whether he to whom the Testator commits the Disposition of all his Goods, be not Executor or universal Legatary? How far the Conditions of Legataries or Executorship against the liberty of Marriage, be lawful? How far as to Legacies or Executorships, the Condition of marrying with the Arbitrament, Will or Consent of another, is lawful? Whether the Condition of forbidding the Alienation of the Legacy is lawful? In what cases the Legatary may alienate the Legacy, notwithstanding such prohibitory Condition of Alienation? Within what time the Condition may and ought to be performed by the Legatary, when no certain time is set or limited by the Testator? Whether the Condition may be performed during the time betwixt the making of the Testament, and the death of the Testator? Whether a Legatary must not perform an Arbitrary Condition as soon as he can? Whether any time doth prejudice a Legatary, whilst he is ignorant of the Condition? Whether a casual Condition may not be accomplished at any time? With innumerable other varieties of Conditions well known to such as are well acquainted with the Law; whereby you may now by this time readily perceive it was a truth which was formerly hinted. That to treat of this subject of Conditions as to Executorship and Legacies, and to do it distinctly, though not in the Amplitude of their due Dimensions, but by way only of a compendious Contraction, would of it self require a very voluminous Tract; being therefore bound up to the Laws of an Abridgment, we may not sail into the vast Ocean of the Laws to fetch you home any Transmarine Resolutions to
the

the said Questions, but shall only refer you to our own Countryman in this Profession, the Learned Mr. Swinborne and others, who of this Subject have written very copiously, yet succinctly.

CHAP. VI.

What things are devisable by Will; and whether a Testator may bequeath what is not his own.

1. *What things in particular may be devised or bequeathed.*
2. *In what case a Legacy given by a Testator, of a thing that is not his own, may be good or not.*
3. *How a Testator may bequeath what is his Executors.*
4. *A Bequest to one of what was his own before, is void.*
5. *The difference between the Common and Civil Law in this point of devising what is another mans, and not the Testators.*
6. *Goods in Joynt-tenancy not devisable.*
7. *Whether Kingdoms are devisable by Will.*
8. *In what cases Presentations, Advowsons, and the next Avoidance of a Church are devisable.*

REGULARLY and infallibly all things that come to Executors, or that at the Testators death can be Affets in the Executors hands, were devisable by him in his Life. More particularly, All the Testators Goods and Chattels, whether real and immovable, or personal and movable, whereof he died actually possessed or interested in Expectancy, in his own, and not in anothers right, nor in Joynt-tenancy with another (saving in some certain Cases in the Law especially excepted) are devisable; As now also are Lands, Tenements, and Hereditaments, whereof some are devisable by Custom, as Gavel-kind, and Burgage Tenure; others by virtue of certain Statutes. But more specifically; first, as to Chattels real, all Leases in Lands or Houses, either for Years, or Years determinable upon Life or Lives, or by Extents, Statutes or Recognizances, or Rents (not Rents reserved by the Inheritor, yet the Arrearages of them also.) Likewise Commons, Advowsons, Tythes, Fairs, Markets, Profits of Leet, and the like in the Testator for Years, and all such Creatures as a Termer hath in a Warren, Park, Pond, Dove-house, or the like, in the Testator for Years. Secondly, as to Chattels personal, all Debtors taken in Execution, Captives, Apprentices, all Cattel of all kinds, Creatures naturally tame, or being otherwise, are by act reduced

duced thereto, as Hawks reclaimed, or the like ; also Hounds, Grey-hounds, Spaniels, Mastiffs, Ferrets, and the like ; also all merchandable Goods and Commodities whatever : Likewise Ships and other Vessels Naval, with their Guns, Rigging, Tackle, Apparel, Furniture and Provisions : Likewise Weapons for War, Books, musical Instruments, and the like : Also Corn, whether in the Ground, Field or Barn : And Trees fell'd or not fell'd, being sold from the Inheritance of the Ground, or excepted by the Seller of the Inheritance of the Land : Also all other Grain, as Corn : Also Hops, Saffron, Hemp, and the like, whether on the Ground, or in the House : Likewise Hay, and all Fruits gathered, (but not Grass ready to be cut for Hay, nor Fruits on the Trees) but such as are separate from the Inheritance ; therefore not Garden-fruits in the Ground, or not separate from it : Also Bills, Bonds, Mortgages, Statutes, and the like : Also Money, Plate and Jewels : Likewise all Household-stuff, Implements, and Utensils, not fixed to the Free-hold : All Coaches, Carts, Waggon, Plows, and the like, with their Appurtenances : Likewise Desks, Cabinets, Trunks, Chests and Boxes, excepting such as contain only the Evidences of the Inheritance, and have used so to do : Also all Linnen, Bedding, Pewter, Brass and Iron, that is movable, and not fastned to the Free-hold, as aforesaid ; therefore not such Coppers, Cisterns or Furnaces, nor Locks and Keys, Window-scot or Window-glass. Finally, here note, That things in Action, as Debts, or the like, are devisable ; so are Obligations, and Counterparts of Leases : Likewise Uses not executed by the Statute of Uses, but remaining at the Common Law. (a) And though Actions altogether uncertain, are not devisable, yet possibilities and uncertainties in divers cases are devisable. (b) But the Chattels real, Leases for Years, Extents, next Avoidances of Churches, and the like, which a man hath only in right of his Wife, and all such Obligations as were made to her alone before Coverture, and all such Chattels real and personal as she hath only as Executrix to another, are not devisable by her Husband ; for upon his death they return to the Wife. †

2. In and by the Question, [*Whether a Testator may bequeath any thing that is anothers, and not his own*] is meant and intended any thing wherein neither the Testator, nor the Executor, nor the Legatary hath any just Propriety, or which doth not of right belong to either of them. Now in order to the Resolution of this Question according to the Civil Law (discrepant from the Common Law in this point) the known Distinction is, That if the Testator did certainly know the thing devised to belong to another, and not unto himself, at the time when he devised the same, then such Devise is good, and the Executor (if there be

(a) Perk. Sect. 500. Dyer.

(b) Perk. Sect. 527. Lit. Bro. Sect. 437 Dyer 272. Plow. 520.

† Perk. Sect. 496. 560. Marth. 44.

Assess

c) L. cum alie-
nam. C. de Le-
gat. & Graff. §.
legatum. q. 14.
nu. 2. & Cul. ac.
ad Leg. virum
ex familia. §. si
rem tuam. De
Legat.

(d) L. non du-
bium §. ult. De
Legat. 1.

(e) L. unum ex
familia §. Si rem
tuam. de Leg. 2.
& Graff. §. lega-
tum q. 14. nu. 7.

(f) Gomez. var.
Resol. tom. 1.
cap. 12. nu. 14.

(g) Sed si rem.
Inst. de Legat.

(h) Plew Gran-
tham's Case
Co. sup. Lit.
185, & 308.

(i) Perk. Sect.
526. Littl. 287.
Dr. & Stu. 167.

Affers sufficient) is to purchase the same, and deliver it to the Devisee. Otherwise it is, in case the Testator were ignorant thereof, and supposed it to be his own; unless the true Owner consent to the Legacy, or that it was bequeathed to pious Uses. (c) And in case the Owner thereof will not sell the same, at least not at any reasonable rate, the Executor is to pay the Legatary the just value thereof. (d)

3. Suppose a Testator doth bequeath some thing that is his Executors: In this case, the Legatary shall have it, whether the Testator did or did not know it to be his (e) The Law is the same, though there be Co-Executors, and the thing so bequeathed belong only to one of them. (f) But in that Case they shall all bear a proportion, to be allowed them in Assets; but if Assets fail, the Legacy fails also.

4. If a Testator bequeath to *A. B.* the same thing which did appertain to *A. B.* in his own proper right, at the time when the Testament was made, it is a void Devise; yea, though *A. B.* should afterwards alienate the thing, so as that the property thereof were cut of him at the time of the Testator's death. (g)

5. Notwithstanding what hath hitherto been said according to the Civil Law, yet by the Common Law the Goods and Chattels that are another mans are not devisable; and therefore if one man gives or devises another mans House, it is a void Devise. So also, if one devise the things that by special Custom of some places (as the Heir-looms do belong to the Heir) this Devise is void, for it is not devisable from him. (h)

6. The Law with us is so far from countenancing a Devise of what is another mans, that it doth not allow the Goods and Chattels which the Testator himself hath jointly with another to be devisable; and therefore if there be two Joynt-Tenants of Goods and Chattels (as when such things are given to two, or two do buy such things together) and one of them devise his part of the things to a stranger, this devise is void. Inasmuch, that if in this Case the Testator make the other Joynt-Tenant his Executor, the Will as to this is void, and he shall not be charged as Executor for these Goods, but he shall have them altogether by Survivorship. (i) So that Joynt-Tenants may not devise what they hold in Joynt-Tenancy; but he that holds in Common or Coparcenary may devise. Yet if a Lease of Lands, or Grant of Goods, be made to two persons, *Habendum*, one moiety to the one, the other moiety to the other: In this Case each may devise his moiety by Will. Nay, the Goods and Chattels which the Testator hath, but not in his own right, but in right of another, are not devisable: And therefore an Administrator cannot devise the Goods and Chattels he hath as Administrator, for such

Devise

Devise is void. (*k*) Howbeit, an Executor may appoint an Executor of the Goods of the first Testator, which an Administrator cannot do.

7. Before any Solution can be given to the Question, Whether Kingdoms are devisable by Will? it must be premised, That of such, some are *Elective*, some by *Conquest*, and some *Hereditary*: If the Question refer to the *Elective*, nothing can be said for it; if to the *Conquered*, much cannot be said against it; if to the *Hereditary*, where that unhappily happens to be a Question, the Sword most commonly decides the point. And though the Law holds it in the Negative, (*l*) yet in Fact, presidents of such Legacies Historians do abound with. To those you have in Mr. Swinburne, (*m*) you may add (*Gladion non Contradicente*,) that of *Darius*, who by his Testament bequeathed that Kingdom to *Artaxerxes*, and to *Cyrus*, the Cities whereof he was Governor. (*n*) And when *Nicomedes* King of *Bithynia*, at his death made the people of *Rome* his Heir, they reduced the Kingdom into the Form and Constitution of a Province. (*o*) And that part of *Africa* which was also bequeathed them by the Testament of *Ptolomæus* King of the *Scyrenes*, (*p*) himself had no title unto, but what he claimed by virtue of his own Fathers Last Will and Testament. (*q*) As *Mithridates* King of *Pontus* acknowledged the Country of *Paphlagonia* came to his Father, not by force of Arms, but only by way of a Testamentary Adoption. (*r*) And it hung long in suspense which of *Oro's* Sons King of the *Parthians*, he had appointed to succeed in the Government. (*s*) Likewise *Polemo* the Supreme in Government among the *Scythians* and the adjacent Regions, instituted his Wife Heiress of the Kingdom. (*t*) *Procopius* relates, That *Arfaces*, one of the *Parthian* Kings, by his Last Will and Testament bequeathed the greater part of *Armenia* to *Arfaces* his Son, and the lesser part to *Tigranes* King of *Assyria*. *Josephus* reports, That *Herod* having leave given him by *Augustus*, to leave his Kingdom to which of his Sons he pleased, did alter and change his Testament several times. (*u*) King *Pepin* devised among his Children all the Dominion of *Aquitane*, which he had acquired by the Sword. (*v*) The King of *Fess* bequeathed the Kingdom thereof to his second Son (*x*) *Aladinus* the Sultan bequeathed several Cities. (*y*) *Michael Despotæ* devised the Country of *Thessaly* in *Greece* among his Children. (*z*) The Prince of *Ætolia*, a Region in *Greece*, left the famous City of *Athens* to the *Venetians*. (*a*) Prince *Charles* by his Last Will and Testament, divided the Country of *Acarnania*, which is that part of *Greece* called *Epirus*, among

(*k*) Plow. 525. Bro. Adm. 3. (l) Bart & Anz. in l prohibere §. plane ff quod vi. aut. clam & Bald in Proem de ffu. dis. nu. 3. 2. & Vasq de Success. § 26. Lim 3. & Jaf in l. Debitorum. C. de Pa & s & Fitzh Abidg. tit. Devise nu. 5. & tit. Execut. nu. 108.

(*m*) Par. 2 § 27. (n) Regn. Artaxerxi, Cyro Civitates quarum Præfatus erat, Testamento Legavit. Sic Justin de Dario lib. 5. (o) Hereditatem Crevimus Regnum Bithyniæ. Cicer. 2. in Rul (p) Epit. Liv. 43. Cyrenem, testamento reliquit Appin Ammianus. lib. 22. Res erim Cyrenarum & Appro & Prolemæus dicebat. vid Breviar. Liv. vid lib. 70.

(*q*) Justin. l. 39. (r) Justin. l. 38. Paphlagonia a i Country in Asia the less, lying between Bithynia, Cappadocia, and the Euxine Sea. (s) Strabo l. 13. (t) Strabo l. 13 De Burgundia Testamento relicta. vid. Aymo. nu. 111. c. 8. & 75

(*u*) Joseph. Ant. Hist. lib. 15; 6. (*v*) Fredegar. in fin. Coronici. (*x*) Leo Af. l. 111. (*y*) Leunclary. Turc. Hist. l. 11. (*z*) Greg. lib. 4. (*a*) Chalco. l. 4. (*b*) lb. Chalco. (*c*) Rembus Irat. 7. & Paral. l. 1.

- his natural Issue. (b) The Kingdoms anciently belonging to *Jerusalem* and *Cyprus*, have been partly bequeathed by Testaments, and partly conveyed by Contracts. (c) Lastly, *Alphonfus* of *Aragon* having conquered the Kingdom of *Naples*, bequeathed the same by his Will to his natural Son *Ferdinand*, who afterwards gave certain Cities thereof as a Legacy to his Nephew. (d) Notwithstanding all which presidents of *Faët*, the *Law* as aforesaid, runs in the Negative; and that *tam quoad Regalia, quam quoad Regna*. (e) But this Subject being too Sublime for a Subject, the Reader for his better Information in the point, is referred to his duty of Allegiance: For where-ever this happens to be a Question indeed, it is more like to be decided by *Arms* than *Books*.
8. A Bishop, if a Church of his become void in his life-time, may not by Will devise the Presentation. (f) But if the Parson of a Church, who hath the Advowson in Fee, shall by his Will devise, that his Executors, or some of them, shall present at the next Avoidance, this is a good Devise. (g) So likewise if the Incumbent of a Church purchase the Advowson thereof in Fee, and deviseth that his Executors shall present after his death, and deviseth the Inheritance to another in Fee, this was held to be a good Devise of the next Avoidance. (h)
- (d) Mariana. l. 30.
 (e) Fitzh. Abr. tit. Exec. nu. 108. & tit. Devise n. 5.
 De hæc. q. vid. Horro. lib. 1. Illust. q. c. 1.
 (f) Cock on Lit. 185. 308.
 (g) Cro. 2. 378.
 (h) Cro. 2. 371.

C H A P. VI.

Of Lands Devisable by Will.

1. *Whether Lands are devisable, what Lands, and how much thereof.*
2. *What things may be bequeathed under a Devise of Lands, and what not.*
3. *What persons incapable of devising Lands.*
4. *Who may be Devisees, or what Persons may take by a Devise of Lands, and what not.*
5. *What kind of Testament sufficient for a Devise of Land, and what not.*

1. **L**ANDS, Tenements and Hereditaments held in Gavelkind are customarily devisable by Will. (a) So likewise are Lands held in Burgage-tenure, (b) whereof the Will may be only Nuncupative, and without writing; and into which the Devisee after the Testator's death may enter without any Livery of Seisin thereof made unto him: (c) Yet this shall not prevent Survivorship in case of Joynt-Tenancy in such Tenure. (d) And though by the Common-Law of this Realm, Lands, Tenements and Hereditaments are not devisable, yet now by Statute they are (if held in Socage) all devisable, and two parts of three, though held in Knight-service. (e) But then the Will must be *in Scriptis*, not Nuncupative. But Copy-holders cannot devise such their Estate; for Copy-hold Land is not properly devisable, nor can any devise the Estate they have in their Land as Tenants in tail, *pur autre vie*, or Joynt-Tenants. Yet if two be Joynt-Tenants for life, and the Fee-simple in one of them, he that hath the Fee-simple may devise the Fee-simple, after the death of the other Joynt-Tenant. And if a Devise be of a House with the Appurtenances, the House being Copy-hold, and the Land Free-hold, by this Devise the Land, though used with the House, shall not pass. (1) Yet where one had Houses and Land which had been in the Tenure of those which had the Houses, and devised his Lands with the Appurtenances: In this Case it was held, That the Lands did pass by these words. (2) Now though Land be thus devisable partly by Custom, partly by Statute; yet there are certain persons incapable of devising Lands, and there are certain Lands incapable of being devised, as appears by what follows in this Chapter. Also an Affirmation made after the Statute of 27 H. 8. of a Will in writing for Lands made before the said

(a) Terms of Law. Verb. Gavelk. & Dyer. fo. 153. verb. Devise.

(b) Fitz. N. B. ex grav. querel. & Dr. & Stud. l. 1. cap. 7. & 10.

(c) Little. tit. Burgage.

(d) Princip. Grounds. fo. 20.

(e) 27 H. 8. cap. 10. it is not necessary that the Will wherein

Burgage lands is devised should be in Writing. But the Custom of the place as to the Probat and Enrolm.

of such Wills, ought to be observed. F. N. B. ex gravi querela & Bro. tit. Devise 22. 45. 51.

(1) Cro. 1. 704. Yares vers. Clincard.

(2) More. Case. Statute, 344.

Statute, makes it a good Conveyance of the Land. For *A.* being seized of Land in Fee, suffered a *Recovery* of it to the use of *J. T.* and his Heirs, who before the Statute of 27 *H.* 8. made a Will in writing, and thereby gave it to his Wife so long as she *continued Sole*, with divers Remainders over, who after the 27 *H.* 8. rehearsed the Will as it was, and affirmed it without putting any new date or seal to it: And it was held a good Will to convey the Land. And by the Custom of *London*, and some other places, a man can bequeath no more than his Deaths part; if otherwise, his Bequest will be void for the rest; and in other places of the Realm a man may bequeath all.

2. As Lands are now devisable, so there are certain things, in some certain Cases, that pass by way of Bequest by and under a Devise of Land; as thus, A man seized of Land devisable, buildeth a House thereupon, the House is devisable. The Law is the same as to a Rent-charge *de novo* created. (f) Also a man disseisor of Land devisable, deviseth to the Disseisor in Fee, in recompence of a Release which the Disseisor made unto him, this is a good Devise. Also where a man hath Land in right of his Wife, and he granteth parcel of it to another, and after deviseth the residue to another, this also is good. Likewise where a man hath a Seigniorie to him descended of the part of his Mother, and after the Tenancy descendeth unto him of the part of his Father, both being devisable, and he not having any Issue: In this Case, he may make Devises to several persons; that is, the Seigniorie to one, and the Tenancy to another. (g) The Lord *Dyer* also saith, That a Termor of Land which is not devisable, erecting a Furnace, and fixing it in the midst of a House in the said Land, may devise this Furnace. Also, that where a man is seized of Land devisable, and deviseth *totum statum suum* to one and his Heirs, this shall be a good Devise for the Land. Likewise where a man deviseth *primam vestram seu tonsuram prati*, which is devisable, it is good, and the Law is the same as to Trees growing, and to grow forever. Also Tenant in Fee-simple or in Fee-tail may devise the Corn, though the Land be not devisable; but as to Trees in that case the Law is otherwise. Also a man seized of a Mill, may devise the Runner-stone, but not the Under-stone, unless the Mill it self be devised. Likewise a man seized of a Common, granteth a Rent out of the Land, although that the Land be devisable, yet that Grant is void, and by consequence a Devise thereof. Nor is an Advowson in gross devisable, nor any other thing which lieth not in Tenure: But a Mesnalty or Seigniorie is devisable, because they lie in Tenure. And if the Husband devise his Corn upon his Wives Land, and dies, this is good, whether the Corn were sown before the Marriage or after. (h)

(f) *Dyer* in Stat. of Wills. 32 & 34. *H.* 8. An Estate for years might be devised at the Common Law by him who was possess'd thereof, but an Estate in Fee might not. Also a Guardian in Knight Service might devise the Wardship both of Body and Land. 30 *Ass.* 1. *Adm.* *Rot. Abridg.* tit. Devise lib. B. (g) 1 *yer.* *ibid.* cap. 4. (h) *Ibid.*

3. The Persons not qualified to devise Lands by Will, are such as these; viz. A Bishop may not devise the Land of his Bishoprick; but of these Arrearages of the Rent of the Bishoprick he may make a Devise by Testament. The Law is the same as to a Dean or Parson of a Church. Also the Master of an Hospital cannot devise the Lands of the Hospital, nor the Arrearages of Rent issuing out of the same. In a word, Spiritual persons, Archbishops, Bishops, Deacons, Archdeacons, Prebends, Parsons, Vicars, or any Member of a Corporation, may not devise the Land or Goods which they have in right of their Churches, or Corporations. (i) For the Head or any of the Members of a Corporation cannot make a Testament or a Devise of such Lands or Goods they have in Common, because they are to go in Succession. Also an Infant of the age of sixteen years seized of Lands devisable, who may alien it by the Custom, yet he cannot make a Testament or a Devise thereof; or if an Infant maketh a Will of his Land within age, and dieth after that he cometh to full age, making no Revocation, this is not a good Will. (k) And yet although an Infant until he be of the age of Twenty one years can make no Devise of his Lands; (l) yet it is held, That by special Custom, in some places where Land is devisable by Custom, they may devise it sooner. Also a Woman under Covert cannot make a Devise of her Land with or without her Husband's consent, neither to her Husband, nor to any other. (m) Yet of the Goods she hath as Executrix to another, she may make an Executor without his consent: but of them she can make no devise either with or without his consent, because they are not devisable; and if she do devise them, the Devise is void. (n) Touching such as are born both Deaf and Dumb, the Lord Dyer says, They may make a Will of their Land by Signs. (o) Though others affirm, That a man that is both Deaf and Dumb, and that is so by Nature, cannot make a Testament, but that a man that is so only by accident, may by Writing or Signs: So also may a man that is only Deaf or Dumb, whether by Nature or Accident. Also an Alien born, and not Denizon'd, cannot make a Testament of his Lands; yet if an Alien purchaseth Land in Fee, and maketh a Will, and after the King maketh him a Denizon, after he dieth, his Will is then good as to his Lands or Goods. (p) An Alien born cannot make a Testament of Lands or Goods, nor one entred into Religion: So it hath been held: (1) And yet withal it hath been held otherwise; and that an Alien born may make a Will, and an Executor, and sue as an Executor, if he be an Alien-Friend, and not an Alien-Enemy: And so it hath been adjudged accordingly. (2) Likewise he may be an Administrator, and have Administration of Leases also, as well as of personal Chattels. (3)

Also

(i) Per. Sect. 496.

(k) Dyer. ubi supra c. 1. §. 7.

(l) St. 32. & 34. H. 8.

(m) Stat. ibid. & Co. 4. 51. & Bro. tit. Test.

13. & Co. sup. Lit. 1. 12. 4. 61.

& Bro. Devise 32. (n) Plowd.

in Casu inter Bransby &

Grantham. fo. 525. imo

nec cum consensu mariti

potest Legare Testatoris.

Bona Swinb. par. 2. §. 9. num.

18.

(o) Dyer in Stat. 32. & 34. H. 8.

(p) Dyer Ibid.

(q) Curia. B. R. 7 Jac.

(2) Eliz. Pass. charias Case.

Hugh Abridge. 879. Case. 3.

(3) Cro. 2. 89. Sir Upwel Case.

rooms. Case.

Also a Traytor Attainted, from the time of the Treason committed, can make no Devise either of his Lands or Goods: for they are all forfeited to the King; yet a Pardon from the King restores him to a capacity of dying Testate as to both. Likewise a man Attainted or convicted of Felony, cannot by Testament devise either Lands or Goods, for they are also forfeited; but if he be only Indicted and die before Attainder, he is then Testable as to both; or being Indicted, will not answer upon his Arraignment, his standing Mute may possibly preserve him a power of Devising his Lands. And although the Testament of a *Felo de se* be void as to his Goods and Chattels, yet as to his Lands it is good. (q) So likewise although a person out-lawed in a personal Action cannot, so as long as the Out-lawry doth continue in force, make a Testament or his Goods and Chattels, yet of his Lands he may; not so of a person Out-lawed for Felony. The Law is the same as to a man Attainted of a Premunire: It is otherwise if a man be only Excommunicated. (r)

(q) 5 & 6 Ed. 6.
c. 11. prerog.
Reg. Plowd.
258, 259. &
261.

(r) Dyer in Sta.
of Wills.

(f) Perk. 505.
510.

(t) Dyer 303,
304. B.R. Cur.
Mich. 3. Jac.

(u) F. 9. Jac.
B. R.

(w) New Terms
of Law. tit. De-
vise. But by the
Civil Law it is
otherwise.

Paul de
Cast. in. l. qui
filiabus §. 1. ff.
de Legibus.

(1) Cro. 1.

742.
Taylor & ux.
vers. Sayer.

4. Regularly all persons who may be Grantees, may be also Devisees. (s) Inasmuch that a Devise of Lands is good within the Statute of Wills, (t) even to such persons as to whom a Legacy by the Civil Law is void, except in certain Cases; such as Hereticks, Apostates, Traitors, Felons, Excommunicates, Out-laws, Bastards, unlawful Colleges, Libellers, Sodomites, manifest Usurers, and Recusants Convict. It is a Rule, That the Devisee must be capable of the thing devised at the time of the Devisors Death, if it be then to take effect in possession; or if it be a Remainder, he must be capable of it at the time when the Remainder shall happen, otherwise the Devise is void. (u) If so, then a Devise to an Infant in the Womb at the Testators death seems to be void: (w) Yet if a man devise to such an Infant, and he happen to be born before the Testators death, it seems that in this Case the Devise is good. Again, a Devise made to a person altogether uncertain, and not certainly named or described, is altogether void. A. devised Land to his Wife for her Life, and that after her death it should remain to his Issue, he having two Sons, and two Daughters: And it was held, That the Devise of the Remainder was void for the uncertainty of it: (1) Yet a plain Description of a person (without naming him) is sufficient, so that a Devise made to the Dean of *Pauls* (without naming him) is good. A man deviseth his Lands to *Eliano* the Daughter of *J. S.* who hath divers Daughters, whereof one is named *Hellen*, and none *Eliano*: This is a good Devise to *Hellen*. (x) Likewise if a man hath two Wives, and he deviseth his Lands to his later Wife in Fee, the first Wife shall have it: Or if he hath two Sons called *John*, and one of them is a Bastard born before Marriage, and

(x) Dyer in Sta.
12 H. 8.

he makes a Devise to his Son *John*, the Legitimate *John* shall have it, and not the Bastard. (y) The Husband can be no Devisee as (y) Dyer *Ibid.* to a Devise of Lands from his Wife. There are three Brothers by the same Father and Mother, and the middle Brother seized of Land devisable, giveth it by his Testament *Propinquiori fratri suo*, it seems that neither of them shall have it. (z) Suppose a man (z) *Ibid.* who hath a term, deviseth the Land to one and his Heirs, the Devisee dieth leaving Executors, his Heirs shall have the Land, and not his Executors: The Law is otherwise in case the entire Term were so devised. (a) A Devise of Land made to the Canons (a) *Ibid.* of a certain Cathedral for ever, or *Canonicis Ecclesiæ D. Pauli Lond. in perpetuum*, is a good Devise to all the Canons joyntly in Fee, and the Survivor shall have the Entierty. If a man willeth that his Executors shall sell his Land for the payment of his Debts, and they all die save one, who maketh the sale: In this Case the Vendee shall not have the Land, the Law were otherwise if the Land had been devised to the Executors to be sold. If a Man hath Issue a Son, and Land is devised to the Father *Habend. sibi & Hæred. de Corpore suo Legitime procreand.* and after the Devisee hath Issue another Son, the second shall have the Land. (b) If a (b) *Ibid.* man deviseth by the Will, That after the Death of his Wife, the Land devisable shall go to *J. S.* his Wife shall have it for her Life by this Devise. Or if a man willeth, that after Twenty years after the death of the Devisor *J. S.* shall have the Land in Fee, the Heir of the Devisor shall have the Land during the Term, and not the Executor. (c)

5. A Testament *Nuncupative* is not good for a Devise of Land, nor a Testament made in Print, if it were never written, yet a Testament written, though no Executor be named therein, is good for Lands, but not for Goods; the reason is, for that Land being not properly Testamentary, an Act of Parliament enables to dispose thereof by Will in writing: So that in this sense (as well as in many others) the same person may die partly Testate, and partly Intestate. Likewise a Testament without sealing or subscribing is good enough for a Devise of Land; (d) so as it be put (d) *Perk. 475, 477. March. Rep. f. 206. pl. 245.* into Writing in the Testators life-time, although it be never proved before the Ordinary. (e) Yea, though it were never brought to the Testator, or read to him after the writing thereof, yet is it sufficient for a Disposition of Land of Inheritance, yea, though the VWill were not fully written in the Testators life-time, provided it were at least so far written as concerns the Disposition of the Lands, and that by the order and direction of the Testator: And this holds true, not only in a Case of Land, as hath been resolved; (2) but also for Goods and Chattels, if there were an Executor appointed. But if in a Testament there are these words,

(f) Ibid.

viz. Hac est voluntas & intentio mea A. B. &c. This is not good for the Disposition or Devise of Land, without saying, *ultima voluntas*, (f) according to the Lord Dyer's Opinion, who in his Learned Readings on the Statute of Wills, 32 & 33 H. 8. if he were indeed the Author of that Impression, 1648. doth further affirm, That if a man makes a Testament of his Land in one County, and long after makes a Testament of his Land in another County, these are good. Also, if that two men severally seized of Lands, make a Joynt-Testament of their Land, this shall be good, and several Testaments. Also, That where a man is in making his Testament, and having devised a parcel of his Land, dies before the perfection and finishing thereof, this shall be good for so much as is devised. That a man willing by his Testament, that his Lands shall be sold to pay his Debts, not declaring by whom, this is a good Will, and shall be performed by his Executors or Administrators. That a man making a VVill of Land, in which he hath nothing, and after purchaseth the same Land, and dieth, this is not good. That a VVoman Covert making a VVill of her Land, and after taking a Husband, who hath Issue, the Husband dieth, the VVife dieth, this is not a good VVill. That if a man make a VVill of his Land, and after Alien this Land in Fee, and after repurchaseth the same Land, this is not a good VVill. That a man making a VVill, and after making a new VVill, and after on his Death bed saith, That his first VVill shall be his last Will, this is good. Also, that where a man giveth Land by his VVill in Fee, and after by another VVill giveth the same Land to another but for Term of Life, this is a Revocation of the Entire first VVill. (g) Also, if a man devise another mans Land, this Devise is void; but if he after the Devise made, purchase this Land, then the Devise is good. (b) And if a man say in his written VVill, *I release to A. and his Heirs all my Land*: This is a good Devise to A. of all his Lands (3.)

(g) Dyer on the Stat. of Wills. c. 2.

(h) Plow. 344. Fitz. Devise 7. Yet the contrary in Mo. Cafe 384. for he is not a person having within the Stat. of Wills.

(3.) Anderf. 1. 33.

(4.) Mo. Cafe 24.

One seized of a Mannor, parcel in *Demesn*, and parcel in *Ser-vice*, devised to his Wife all the *Demesn* Lands, and the *Ser-vices* and *Chief-Rents*, for Fifteen Years, and devised the *whole Mannor* to another after the death of his Wife: It was held, That the Devise took no effect for any part of the manner, till after the death of the Wife; and that the Heir of the Devisor after the Fifteen Years, and during the life of the Wife, should have the *Ser-vices* and *Chief-Rents* (4.)

C H A P. VIII.

Certain Cases touching Devises of Land, void or not.

1. *Lands what; and how devisable.*
2. *Certain void Devises of Land.*
3. *To what Persons, and in what Cases Devises of Land may be good, or not.*
4. *The same Lands twice devised to several persons in the same Will, how both Devises may stand good.*
5. *The profits of Land devised to pass the Land it self; in which Case Testaments more favourably construed than Deeds.*
6. *How Lands purchased after a Devise of Lands made, may pass by that Devise, or not.*
7. *Several Cases in Law referring to this Subject.*

1. **A**lthough Lands made devisable by Statute, cannot be devised otherwise than by Will in writing, yet Lands and Tenements devisable by Custom, may be devised by a Nuncupative Will without any writing. But Copy-hold Land is not devisable; nor can Tenants in Tail, or *pur autre vie*, or Joynt-Tenants, devise their Estate in the Land so holden, no more than they could before the making of the said Statute, which doth not empower them thereunto. But such as are seised of Land in Common or Coparcenary, may devise the same. (a) And if there be two Joynt-Tenants for Life, and the Fee-simple to one of them, he that hath the Fee-simple may devise his Fee-simple after the death of the other Joynt-Tenant for life. And in such places where Lands were devisable by Custom, before the making of the Statute of 32 H. 8. a Devise of Lands may be good against the Heir for the whole; but by the Statute empowering to dispose of Lands by Will, a Devise of Land is not good against the Heir, save only for two parts in three.

2. He that deviseth Land, ought to have a right to, and possession of the Land he deviseth, otherwise the Devise is not good; and therefore if a Disseisor devise the Land he hath gotten by Disseisin, this Devise as to the Disseisee is void. (b) Likewise if a man be disseised of his Land, so that he hath nothing but a Right thereof left, and then he devise his Right, or the Land, this Devise is also void. So if one Contract for Land, and pay his money for the same, but hath no Assurance made him of the Land, and he devise the same to another, such Devise cannot be good; yet possibly he that received the money may be compella-

(a) Stat. 32 H. 8. c. 1.
& St. 34 H. 8. c. 5 & Coke sup. Lit. III. Perk. Sect. 544. Lit. Sect. 287. Dyer 210. Old N. B. 89. Perk. Sect. 500, 739, 540, 446, 497, 498.
A man seised of Land devisable, deviseth totum statum suum to one and his Heirs, this is good for the Land. Dyer's Read. on Stat. of Wills. Sect. 4. § 6.
(b) Plow. 485.

(c) Nevill's
d) Plow. 144.
& Fitz. De-
vise 7.

(e) Adjudged
Powfley and
Blakeman's
Case, A man
deviseeth his
Land to Elianor,
the Daughter

of J. S. and he hath divers Daughters, whereof one is named Hellen, and one Elianor, this is a good Devise to Hellen. Vid. Dyers Read. Stat. on Wills, Sect. 3. §. 15.

ble in a Court of Equity to assure and settle the Land according to the Devise. (e) Likewise if one devise another mans Land, such Devise is void; but if after such Devise made, he purchase this Land, and die without Revocation, now is that Devise good. (d) Also if *A.* bargain and sell Land to *B.* on Condition of Re-entry, if he pay to *B.* Twenty pounds; and *B.* Covenants that he will not take the profits until default of payment; and *A.* make a Lease of Seven years thereof to another, and after break the Condition: In this Case *B.* may devise the Land, and the Devise will be good. (e)

3. If one devise his Land to the Children of *A. B.* by this Devise the Children that *A. B.* hath at the time of the Devise made, or at most, at the time of the Testators death, and not such as shall be born after his death, shall take by that Devise and have the Land. Also, if a Devise of Lands or Goods be made to the Heirs of *A. B.* (he then, and at the time of the Testators death being alive) this Devise is void; because the person to whom a Devise is made must be capable of the Devise by that name by which the Devise is made to him, when there is no other description whereby to infer the Testators meaning; yet if Lands or Goods be devised to the Executors of *A. B.* and he die before the Testator, and make Executors, this is a good Devise to such Executors; or if a man make a Feoffment of his Land to the use of his Last-Will, and then devise that his Feoffees shall be seised to the use of *B. C.* this is a good Devise of the Land *per intentionem*. (f) Also a Devise of Land to one, paying so much a year to another, with a Clause of Distress upon failure of payment, is a good Devise; but a Warranty cannot be made by a Will. (g) Yet if Land be devised for Life, or in Tail, reserving a Rent: In this Case, the Devisors Heirs shall be bound to the Warranty in Law, and the Devisee shall take advantage thereof. Also a Devise of Land may be made to one, and a Devise of a Rent out of the same Land to another in the same Will, and both stand good. Likewise Land may be devised to one in Fee, and after the same Land in the same Will may be devised to another for Life, or for Years, and both these Devises may be good, and may well consist together. (b)

(f) Pasch. Jac.
Newmans Case.

(g) Co. sup.
Lit. 385.

(b) Plow. 523.
340. & Dyer
357. & Co. 8.
24. 33.

4. In like manner, if a man in the former part of his VWill devise all his Lands by general words to one in Fee, and in the latter part of his VWill devise some special part thereof unto another in Fee; both these Devises are good, and may stand together, that is, the former Devise is good for as much as is not afterwards

terwards more specially devised notwithstanding the subsequent Specification ; and the latter is good for so much as is so specially devised, notwithstanding the precedent general Disposition. It is otherwise when the General Clause comes last, for then the first Devise is void. (i) So also it is to be supposed where both (i) 38 Eliz. the Devises are particular, that then the first Devise is void : Co. Banc. As suppose a man doth first in his VVill devise *Long-acre* to *A.* and his Heirs, afterwards in the same Will he doth devise the same Land to *B.* and his Heirs : In this Case some have held the first Devise to *A.* is void ; which others have denied, holding that both the Devises are good, and that *A.* and *B.* in this Case shall be Joynt-Tenants. (k)

5. If a man devise the use, profits or occupation of his Land, by this Devise the Land it self is devised. (l) But not so of Goods, for one may have the occupation, and another the property of them--*March* 106. Or if a man devise only the profits of his Land, this is a Devise of the Land it self. (m) For Lands will pass by words in a VVill, which will not pass by the same words in a Deed ; but whatsoever will pass by any words in a Deed, will pass by the same words in a VVill ; the reason is, because VVills are always more favourably interpreted than Deeds, and there is good reason for that also. If a man says in his VVill, I give all my Land, or all my Tenements to *A. B.* he shall have not only all the Lands whereof the Devisor is sole seized, but also all the Lands whereof he is seized in Common, or Coparcenary with another ; and not only all the Lands he hath in possession, but also the Lands he hath in Reversion of any Estate he hath in Fee-simple. But if he say, I give all my Lands in possession only, then the Lands he hath in Reversion are excluded out of that Devise. (n)

6. If a man seized of Land of Fee-simple in the Parish of *Grade*, saith in his VVill, I give all my Lands in the said Parish to *A. B.* and after the VVill made and published, he doth purchase other Lands in the said Parish, and dieth : In this Case, and by this Devise, *A. B.* shall not have the new purchased Lands. (o) Yet by a new Publication of the VVill after the purchasing of such Lands, they will pass to *A. B.* the Devisee. (p) Yea though he hath no Land in the said Parish at the time of making the said Devise, yet if afterwards he doth purchase Lands in that Parish : In this Case, such new purchased Lands will pass by the said Devise, because it shall in that Case be intended that he meant to purchase them. And therefore if one devise the Mannor of *D.* when he hath no interest therein, yet after that shall happen to purchase the said Mannor, and then die without Revocation of the said Devise : It is held a good VVill as to that Devise, be-

(k) Quere.

Dyer in his

Lect. 1 &c

per Inst. Dodr.

(l) Co. 8 94.

Plow. 525.

(m) Brownl. 80.

1. part.

(n) Plowd. 66.

(o) Plow. 343.

344. Old N. E.

89. Fitz. De-

vise 17.

(p) Trin. 37 Eliz.

B. C. Breckford

vers. Parincote.

- (1) Flow. 344. cause it shall be intended that he meant to purchase it. (1) Also if a man hath some Lands in Fee-simple, and other Lands only for years in *Dale*, and he devise all his Lands and Tenements in *Dale*: By this Devise the Lands and Tenements he hath for years do not pass; but if he hath no other Lands in *Dale*, but those for years: In this Case probably they will pass. (q) But if one hath a Lease for years rendring Rent, and the Lessor devise his Rent to one for life with a Remainder over: it was held, that hereby the Land it self did pass, when the Lease for years was ended. (2)

(2) More Case
1066.

7. *A.* deviseth his Land to *M.* his Wife, until *E.* his Daughter shall accomplish the age of 21 years, the Reversion to the said *E.* and the Heirs of her Body, upon condition that she shall pay unto his said Wife during her life, in recompence of her Dower of all his Lands 20 *l.* and upon default of payment he Wills his Wife shall enter, and enjoy all the Lands during her life, the Remainder *ut supra*, the Remainder to *J. S.* in Tail, and dies. *M.* the Wife enters, *E.* the Daughter being within the age of 14 years. *M.* take to Husband *J. D.* the Husband and Wife came and demanded the 20 *l.* and none ready to pay it. Whereupon the Husband and Wife brought a Writ of Dower and recovered. In this Case it was resolved, where the 20 *l.* Rent, or a sum in gross, That by the bringing of the Writ of Dower, the Wife of the Devisor had lost all the benefit which was to come to her by the Devise; because the said Rent was devised to her in recompence of her Dower; so that it was not the meaning of the Devisor that the Wife should have both. (r)

(r) Mic. 30. Eliz
in C. B. Gesslin
& Weibur
ton's Case. Leon.
Repp. 137, 138.
(f) 5 P. & M.
vid. Owen 30,
& Hughes
Abridg.

(f) In the time of Queen *Mary*, *Benloes* Serjeant moved this Case: A man seised of Lands and Tenements in *London*, devised them by these words; *viz.* [I will and bequeath unto my Wife *A.* my Livelihood in *London* for Term of her Life,] and that by this Will the Lands in *London* pass to the Wife by this word [Livelihood.] Note: For *Brook* Justice said, That it was in ancient time used so in divers places of this Realm, and had been taken for an Inheritance. Unto which *Dyer* also agreed.

A. having two Sons by two Wives, devised his Land to *J.* his Eldest Son and his Heirs after the death of his Wife, to whom he devised them for her life. The Question was, Whether the Son should take them by Devise as a Purchaser, or as Heir at Common Law by descent. The Court held, That the Devise was void, and that was it not in the power of the Son to make Election to take by Descent, or by Purchase; but he must of necessity take the Land as the Law directs, which is by Descent: And it is against the Maxim of Law to give a thing to such a person to whom the Law gives it, if it had not been given.

(1) Mic. 24
Car. in B. R.
rot. 3052.
Preston &
Holme's Case.
Styles 148,
149.

It hath been held, That if a Devise be of Land to Executors, and they renounce the Will, that yet they may take the Devise.

Q. How a Devise (be it of Land) given to Executors *qua tales*, can hold good, when upon their Renunciation of the Will there are none Testamentarily such in being (1)

(1) More Case
808. Gibbons
vers. Marli-
ward.

One Devised all his Lands that he had purchased of A. B. and then he had purchased it, but had not his Conveyance of it; yet it was held, That the Lands passed by that Devise (2).

(2) Anders.
183. 189.

If any one hath an ancient Tenement, and Lands thereto belonging, and then purchase more Lands, and occupy them all together with the Tenement many years: And being all thus in his Occupation, saith in his Will, *I give my Tenement in D. and all Lands belonging to it, now in my Occupation, to A. B.* By this Devise A. B. shall have the ancient Land only, and none of the new-purchased Land. But if there be no ancient Land belonging to the Tenement, but new-purchased Land only, there possibly it may be otherwise; for otherwise the words will not be satisfied; as, where a man hath some Lands in Fee-simple, and other Lands for years only in D. and he devise all his Lands and Tenements in D. here the Lands he hath there for years shall not pass: But if he hath no other Lands in D. but the Lands he hath for years: In that Case, these Lands may perhaps pass by the Devise (3).

(3) Hill. 20.
Jac. B. R. Lofts
& Baker.

If a man hath a Messuage, and Land which he hath usually enjoyed with it, and by Will deviseth the Messuage with the appurtenances: By this Devise the Land doth not pass (4).

(4) Cro. I. 852.
Higham vers.
Baker.

If one seised of Land in a Village, and in two Hamlets of the same Village, devise all his Lands in that Village, and in one of the Hamlets by name: By this Devise none of his Land in the other Hamlet will pass (5).

(5) Dyer 261.

One seised of Land in Fee-simple in D. devised by his Will in this manner; viz. *I give all my Lands in D. unto A. B.* And after the Will made and published, he doth purchase other Lands in D. and dieth: By this Devise A. B. shall not have the new-purchased Lands (6): It may be otherwise, in case it can be sufficiently proved, that the Devisor had an intent to purchase these Lands when he made and publish'd his Will; or that it was his intent that these new-purchased Lands should pass with the rest.

(6) Plow. 343.
Old N. B. 89.
Fitz. Devise 17.

One having Issue a Son and a Daughter, devised that his Son should have his Land at his age of 24 years, and that A. should be his Executor, and should repair his Houses, and have the oversight and doing of all his Lands and moveable Goods till his said age of 24 years: It was held, That by this A. had no interest in the Land but an Oversight-interest (7).

(7) Yelverton.
One 73.

One seized of Land, and possessed of a Term, devised all his Lands and Tenements to his Executors till they had paid his Debts, By this Devise they shall have the Term as Executors, and the other Land as Devisees (8).

(8) More Case
470.

A man made his Will in these words; viz. I give and bequeath one half of my Lands to my Wife, and after her death I give all my Lands to the Heirs Males of any of my Sons, or next of Kin. In this Case it was held, That the Devise was void, because of uncertainty, and the words being in the disjunctive; and we ought not to frame a sense upon the words of a Will, where we cannot find out the Testators meaning *u*. Likewise it hath been adjudged, That Lands devised to a mans Issue was uncertain, and therefore such Devise void *x*. And in the former Case it was further said, That the Devise was uncertain, for that the intent of the Devisor doth not appear; for it appears not what Heir male shall have the Land, whether the Heir male of the Son, or the Heir male of the next of Kin, for the words are in the Disjunctive: And besides the said Judgment given in *Taylor* and *Sawyers* Case, 42. *Eliz.* C. B. It was also adjudged in this very point, *Hill. 2 Car. C. B. Rot. 1288.* in *Hunt* and *Fisher's* Case. And in the principal Case it was said, That the intent of the Devisor here was *caca & sicca*, senseless, and cannot be known, in which Case a sense ought not to be framed upon the words of a Will. So the Court inclined to opinion, that the Devise was void *†*.

(†) Beal &
Wyman's Case
ubi supra.

If one devise his Mannor of *A.* in *S.* and it lie in *S.* and *M.* By this Devise that part of the Mannor which lies in *M.* will not pass. And therefore if one having divers parcels of Land lying in the Parishes of *S.* and *M.* called altogether *Rushcrofts*, usually enjoy'd together as one Farm, make his Last-Will and Testament in this manner; viz. *As to the Disposition of all my Lands and Rents, &c.* inter alia, *I give all those my Lands in the Parish of S. called Rushcrofts, to my Wife for life, and after her decease, that it shall go to John my Son and his Heirs:* And after other Clauses, then saith, *and if my Son John die without Issue, then Rushcrofts shall remain to my three Daughters in Fee.* By this Devise, that part only of *Rushcrofts* which is in *S.* and not the whole doth pass (1).

(1) Cro. 1. 22.
Tuffesham vers.
Roberts.

A Devise of a Fee-simple to the Devisors own right Heirs is void; for they are in by Descent: It is otherwise of a Tail (2) Also to the Son and Heir, and his Heirs, such Devise is void, though it be not to the Heirs Collective, but to the person that is Heir in Fee. (3).

(2) Hob. 30.

(3) Hob. ibid.

One devised his Land to his two Sons, and the Heirs of their Bodies; and saith after, That his Executors shall have it until they

they come to their several ages of 21 years: And one of them only came of age, and it was held, That he should have his part (4).

(4) Cro. 2. 259.

A. deviseth Land to *B.* and *C.* his Sons, and to the Heirs of their two Bodies begotten; and Wills, That each of them shall enter at their several ages of 21 years, and that the Executors shall take the profits of their Lands untill they come to their several ages of 21 years: In this Case it was held, That the Sons should not have the Land till they were both of age, and the Executors till then should have it (5).

(5) Bull. 1. 42

A. devised his Land to his eldest Son and his Heirs, after the death of his Wife: And it was held, That the Devise was void, and the Devisee hath not Election to take by Purchase or Descent (6). Also, if one hath but one Daughter, and devise his Lands to her in Fee; or a Son and Heir, and devise it to him in like manner, such Devise is void, and they shall take by Descent. (7)

(6) Styles 148

(7) Goldsb. 141
Plow. 55.

If a man hath in his Occupation several Farms together, and then doth devise one of the Farms called *D.* and all the Lands to the same belonging, the other Farms shall not pass with it, although they be occupied all together *y.*

(y) Trin. 20.
Jac. in B. R. rot
811. Knight's
Case. Godbolt.
353.

If a man doth will and devise, That *A.* and *B.* his Feoffees shall stand seised, and be seised to the use of *J. S.* for his Life, the Remainder over, &c. when in truth he hath no Feoffees It is a good Devise to *J. S.* by reason of the intention. Or if a man make a Feoffment to his own use, and afterwards devise, That his Feoffees shall be seised to the use of his Daughter *A.* who in truth is a Bastard, it is a good Devise of the Lands by Intention *z.*

(z) Mic. 2. Car.
in B. R. Baf.
field & Dybo.
ro's Case.
Popham 128.

Three Brothers are of one Father and Mother, the middle Brother seised of Land devisable, giveth this by his Testament *Propiniori fratri suo.* It seemeth that none of them shall have it *a.*

(a) Dyers Read.
on the Stat. of
Wills Sect. 2.
4. 5.

Note, it was held by the Justices, That if a man seised in Fee of a Mannor and Lands, deviseth the same by his Will to his Son, and afterwards in another part of the same Will, deviseth a third part of the same Lands to another of his Sons, that they are Joynt-Tenants of the Lands: And so if a man in one part of his Will deviseth his Lands *A.* in Fee, and afterwards by another Clause in the same Will he deviseth the same Lands to another in Fee, they are Joynt-Tenants *b.* In like manner, if one seised of a Mannor and Lands, doth devise the same to his Son, and after by another part of his Will deviseth part of the same Lands to another of his Sons: These Devises are good, and they shall be Joynt-Tenants (1) Though they are properly said to

(b) Mic. 8 Eliz.
in C. B. Leon. 3.
Part. 11. &
Hughes Abr. 3.
Vol. in Appen.
dit. Wills Testa-
ments and De-
vises.

(1) Leon 3. 1.

- be Joynt-Tenants, where goods and Chattels are so given to two persons, or two do so buy such things together, that they possess themselves joyntly one with the other: And such things are not devisable. Or if one have Issue two Daughters, and deviseth Land to them in Fee: By this they shall be Joynt-Tenants, and shall come in by the Devise, and the Survivor shall have the whole (2). Or if one devise his Land unto two *Aqualiter*, and to their Heirs: By this they are Joynt-Tenants, and not Tenants in Common (3). Likewise a Devise to *A.* and *B.* joyntly and severally for their lives: By this the Devisees are Joynt Tenants, not Tenants in Common (4). Or if one having only two Daughters, Devise his Land to them in Fee: By this they shall take as Joynt-Tenants, and not by Descent as *Parceners* (5). Or if one devise his Land to *A.* and *B.* (without more words) it seems by this they shall take as Joynt-Tenants (6). Also if a Devise of Land be to two equally, they are Joynt-Tenants: But if it be to two and their Heirs equally, or part and part like, it is a Tenancy in Common (7). Likewise, if a Devise of Lands be by a Father to his two Sons equally, and their Heirs, they are Tenants in Common (8). Also where one devises his Land to two for life, equally to be divided, there they are Tenants in Common (9). One devised his Lands to his three Daughters in Tail, and after in his Will saith; *viz. I will that every of them be others Heir by equal portions*: And it was held, That if one of them died, the Survivors should be Tenants in Common, and not Joynt-Tenants (10). Likewise if one devise to *A.* and *B.* and their Heirs his Land in D. equally, or to be equally divided: By this devise they shall hold as Tenants in Common (11). Or if one devise Lands to *A. B.* and *C. D.* and the Heirs of either of their Bodies lawfully engendered: By this also they shall take and hold not as Joynt-Tenants, but as Tenants in Common. Or if one saith in his Will, *That A. and B. shall have his Lands in D. and occupy them indifferently to them and their Heirs*: By this Devise they are also Tenants in Common (12).
- (2) Owen. 65.
(3) Anderf. 217.
(4) Popham. 52.
(5) Goldsb. 141. Plow. 53.
(6) Mich. 37. 38. C. B. Lowen & Cox.
(7) More Case 7. 25.
(8) Cro. 369.
(9) Dyer 25. 35c.
(10) Anderf. 1. 194.
(11) Mic. 37. 38. Eliz. C. B. Lowen v. Cox.
(12) Pasch. 9. Jac. Brownl. 1. 131. 139. Bulstr. 1. 113.
(c) Tim. 36. Eliz. Brown & Pease's Case. Anderf. Rep. Case 315.
- (c) Between *B.* and *P.* the Case was this: *J. W.* being seised of the Mannors of *W.* and *C.* in Socage, made his Testament, devised the two Mannors in four following; *viz.* The Mannor of *W.* to the eldest Son of *R. F.* his Cousin, and his Heirs; and further, he devised the other Mannor to *M. W.* during her life; and if she dies, and then any of my Cousin *F.*'s Sons living, then I Will my said Mannor of *C.* to him that shall have my Mannor of *W.*—*R. F.* had two Sons *G.* and *J.*—*G.* enters on the Mannor of *W.* and the said *M.* enters on the other Mannor. After *G.* dies without Issue. *J.* enters on the Mannor of *W.* and alienates the Fee thereof. Afterwards *M.* dies. *J.* living. The Question was, Whether *J.* ought

ought to have the *M.* of *C.* or not. The Court agreed, That he could not have it, for that he was not such person as was named or limited to take by the Will, for that he had not the Mannor of *W.* at the time of the decease of *M.* and therefore not the person intended by the Will.

(*d*) The Case was : That *R. P.* seised of divers Lands in *A.* and having Issue four Daughters, *B. F. F. M.* made his Will ^{27 *El.*} in writing, and thereby all his Land in *A.* he devised to *B.* and *F.* his Daughters, and made them his Executrices, and after in ^{33 *Eliz.*} purchased other Lands in *A.* (which are the Lands in Question) and after one *F. S.* came to the Devisor, and desired that he would sell unto him those Lands which he lately purchased. And he said, *No, they shall go with my other Lands in A. to my Executrices.* Afterwards in ^{34 *Eliz.*} he fell sick, the Will was read unto him, and he said nothing thereto; but then gave divers Legacies of Goods to others, and caused them to be written and annexed in a Codicil thereto, and died : Whether these Lands newly purchased shall pass to the Executrices by that Will, was the Question? *viz.* Whether by those words used to a Stranger, or the annexing of a Codicil to the Will, being only concerning Goods, be as a new Publication of his Will, to make these Lands to pass? &c. First, It was agreed by the Council on both sides, and by the Justices, That if the Devisor after the Purchase of that Land had made new Publication of his Will, and shewed his intent, that those Lands should pass, it had been a good Devise of them : For the words in the Will are [*all his Lands in A.*] which are apt enough and sufficient to carry them, and he could not have added more apt words thereto. But afterwards all the Justices (*Gawdy absente*) held, that it is a new Publication of his Will, and sufficient by the words to *F. S.* for that shews his intent sufficiently, and the Will writ hath words sufficient. And *Fenner* held, That the annexing of the Codicil thereto, is a new Publication as to it : For therein he affirmed, that it should be his Will at that time. But the other Justices doubted thereof, because he doth not shew thereby any intent, that this Will should be for his purchased Lands, nor that he then remembred them. But for the foresaid Reasons it was adjudged for the Plaintiff, That these Lands well passed by the Will.

Suppose a man hath two Sons, both named *John*, and conceiving his eldest Son to be dead, he deviseth his Land by his Will to his Son *John* generally, when in truth the eldest Son is living. In this Case, the younger Son may alledge and give in evidence the Devise to him, and may produce Witnesses to prove the intent of his Father; and if no proof can be made, the Devise shall be void for the uncertainty of it.

(*d*) Trin. 37
Eliz. Beckford
ver. *C. Furnecott.*
Cro. par. 3.

(*e*) Mich. 34
Eliz. In the
Court of Wards
The *L. Cheney's* Case. Co.
s part. 67.

Glanville Serjeant prayed the Opinion of the Court in this
 (f) Mich. 48. & Cafe. (f) A man had Issue a Son and Daughter, and devised his
 49. Eliz. C. B. Lands to his Son in Tail, and if he died without Issue, that it
 Bon vers. Smith should remain to the next of his Name, and died. The Son died
 Cro. par. 3. pl. without Issue, the Daughter being then married, whether she
 64. should have the Land was the Question? And held *per Curiam*,
 That she should not; for she lost her Name by her Marriage,
 but it should go to the next Heir male of the name. But if she
 had not been married at the time of her Brothers death, the
 Daughter should have had it, for she was the next of the
 Name.

(g) Trin. 39. (g) One devised certain Lands in *N.* in Tail, the Remainder to
 Eliz. C. B. Job- the next of the Kin of his Name, and at the time of the De-
 son's Cafe. Cro. vise, the next of his Kin was his Brothers Daughter, who was
 par. 3. then married to *J. S.* The Devisor died. The Tenant in Tail
 died afterwards without Issue: Whether the Daughter should
 have the Land was the Question, upon a special Verdict, and ad-
 judged without Argument, that she should not: For she is not
 now of the name of the Devisor, but of her Husbands name.
 But if she had been unmarried at the time of the Devise, and
 death of the Donor, although she had been married at the time
 of the death of the Tenant in Tail without Issue, yet she should
 have had the Land. Wherefore it was adjudged accordingly.

(h) Mich. 41 (b) *Ejectione Firme*: For certain Lands in *A.* upon Evidence
 Eliz. B. R. to a Jury, a Devise was shewn of an House with the Appurte-
 Yates vers. Clin- nances, and thereby Land in the Field was claimed. And *Popham*
 kard Cro. par. 3. doubted whether it should pass. But *Fenner* said, That it well
 might pass. And that upon *Demurrer* in 28 Eliz. it was adjudged
 accordingly. The Defendant then to make it clear shewed,
 That the House was Copy-hold, and the Land Free-hold: And
 the whole Court thereupon conceived, That it could not be said
 Appurtenant, although it had been used with it. Wherefore the
 Plaintiff was Non-suited.

(i) Trin. 2. Jac. (i) In the Cafe between *H.* and *H.* all agreed the Cafe of 13 *H. 7.*
 Horton vers. That a Testators Devise to his Heir of his Land after the death
 Horton. B. R. of his *Feme*, is a good Devise (by *Implication* to the *Feme*) of
 Cro. par. 2. that Land during her life; for it appears he intended his
 pl. 4. Heir should not have it besides the *Feme*, and none other
 can have it besides the *Feme*. And therefore it is a good De-
 vise to the *Feme* by *Implication*. But if such a Devise had been
 to a Stranger, after the death of his *Feme*, it might peradventure
 have been otherwise; for the Heir in the *interim* might have had
 it. Thus if one devise his Land to *A. B.* in Fee, after the death of
C. D. (being his Son and Heir apparent: By this Devise *C. D.*
 hath an Estate for life by *Implication*, and until the Devise shall
 take.

take effect, the Law will give it to him by Descent. The Law seems likewise to be the same, where one doth devise his Land to *E. F.* after the death of his Wife : In that Case the Wife shall have an Estate for her life by *Implication*. For which reason it is, That if a man devise in this manner ; viz. *Item, I give my Goods to my Wife, and that after her decease my Son and Heir shall have the House where the Goods are.* It is supposed, That by this Devise the Wife shall have an Estate for her life in the House by *Implication*. It seems to be otherwise, if a man devise his Land to *G. H.* after the death of *J. K.* who is a stranger to the Devisor ; for in this Case it seems *J. K.* hath no Estate by *Implication*, and that in such Case of a Stranger, it doth only demonstrate and set forth when the Estate of *G. H.* shall begin ; and that the meaning and intent of the Devisor was, that his Heir should have it until that time. But if one having a Term of years, devise that his youngest Son shall have the same after his Wife, she shall have it for her life by *Implication*. Notwithstanding which, if one having a Lease for years, devise part of the Term to a Child after the death of his Wife : In this Case, and by this Devise, nothing is devised to her by *Implication*. Yet if one devise that his Executors shall have his Term till his Son come to the age of 21 years, by this his Son shall have it when he comes to that age (i).

(k) Note, That the Opinion of all the Justices was, That if one make his Testament, wherein are these words ; viz. [*I release all my Lands, &c. to A. and to his Heirs.*] It is a good Devise of the said Lands to *A.* and his Heirs.

(i) Upon a Special Verdict the Case was this : A Woman seized of Lands made her Will, and devised the same to one and his Heirs, after they inter marry. After Marriage the Woman intending to revoke her Will, doth revoke it by Words after Marriage, and saith, That her Husband shall not have the Land by her Will, and after dies : Whether the Husband by that Will, or the next Heir to his Wife, shall have the Land, was the Question ? The Case was argued *pro & con*, several Arguments on both sides. In fine it was adjudged, That the Will was void, and that the Husband could take nothing thereby. And although a new Publication, after the Husbonds death, of a Womans Devise of Lands, made during Coverture, makes the Devise good, yet if she so make and publish it during Coverture, and after her Husband die, and she become sole, this Accident alone will not, without somewhat else, make the Devise good (2).

In an Ejectment : The Case was, A man devised all his Fee-simple Lands wheresoever to his Brother upon Condition, That he suffer his Wife to enjoy all his Free-Lands in *H.* during her life : And the Jury found, that the Testator had only a portion

(i) Brook. tit. Devise 48 52.
Lit. Broo. 107.
13 H. 7. 13.
Plow. 158. 521
Bull. 2. 127.
Cro. 2. 74.
Horton vers. Horton.
(k) Mich. 37.
H. S. Anderf. Case 83.
(l) Mich. 30, 31.
C. B. Ander. Case 117. vid. dict. Case.

(2) Plow. 344.

of Tythes in *H.* And whether the portion of Tythes did pass to the Wife by the Devise? was the Question. It was objected, That the Tythes passed not: And *Mich. 43 Eliz.* A Devise of Lands extends not to Tythes; for Tythes are not Lands, but a Collateral thing to the Land. And *Trin 42. Eliz.* in that Tythes cannot be Appendant to a Mannor. But it was holden by the Court, That the Tythes did pass; for that being in Case of a Will, the meaning of the Testator shall be observed if it can be found out; and if it should not be so in this Case, part of the Will should be void, which may not be, if it may be otherwise by a reasonable Construction: And it is clear, the Testator intended to devise the Land in *H.* And by a Will, things of one nature, may pass by words which are proper to pass things of another nature. The Court inclined to Opinion, That the Portion of Tythes in *H.* did pass to the Wife (3).

(3) *Hill. 1649.*
rot. 748. B. R.
Sanders and
Riches Case.
Styles 278.279
(m) *Pasc. 5*
Eliz. Moor.
Rep. n. 143.

(m) A man devised his Land to his Wife from year to year, until his Son *J.* come to the age of 20 years, and dies; the Wife enters. *J.* dies before he attain the age of 20 years. And it was moved by *Harper*, Whether her Interest were thereby determined. And it was held by all the Justices, That by the death of the Son the Estate of the Wife was determined, and that she had no longer any Estate therein. For it is to be intended that the Will of the Devisor was, That his Wife should have the Land during the Minority of his Son, for that he himself could not legally dispose of the Land, being within age. And *Dyer* said, That by these words, *de anno in annum*, it is intended that the Will of the Devisor was, That the interest of the Wife should determine by the death of his Son. But if the words had been, [until his Son should come, or might come to that age of 20 years,] then notwithstanding his death, the Estate of the Wife had continued.

(n) *Mich. 30. El.*
in C. B. Sir An.
Denny's Case.
Leon. 2 part.
190. & Hugh.
Abridg. Appen.
sit. Devif.

(n) *A.* seized of the Mannor of *Cheffam*, extending into *Cheffam*, and the Town of *Hertford*, and also of Lands in *Hertford*, devised by Will the Mannor of *Cheffam* to *B.* his eldest Son in Tail, and the Lands in *Hertford* to *C.* his younger Son. It was held by all the Justices, That the younger Son should have all that part of the Mannor of *Cheffam* which lay in the Town of *Hertford*.

(o) *Pasc. 16.*
Eliz. in B. R.
Leon. 2. part.
221. & Hugh.
Abridg. *ibid.*

(o) *A.* devised that his Lands should descend to his Son, but willed, That his Wife should take the profits thereof, until the full age of the Son, for his Education and bringing up, and died: The Wife married another Husband, and died before the full age of the Son. It was the Opinion of the Justices, in this Case, That the second Husband should not have the profits of those Lands till the full age of the Son: For nothing is devised to the Wife but a Confidence, and she is a Guardian or Bailiff for to help the

the Infant, which by her death is determined, and the same Confidence cannot be transferred to the Husband.

A man seised of a Messuage to which a Garden and a Curtelage did belong, enclosed with a Wall, and there was no way to the Garden but through the Messuage: He devised the Messuage to his second Son in Fee, not mentioning the Garden nor Curtelage, nor saith *cum pertinentiis* p: It was adjudged in this Case, (p) Hill. 30 El. That the Garden and Curtelage did pass by this Devise: They B. R. Garden & Tuck's Case, Cro. 2. Part. 89. & Hugh. 89. & Hugh. ibid. said a Curtelage is parcel of the House, as a Stable and a Dove-house; and the Garden shall pass, because it is as well for necessity to it as for pleasure. Yet by the Devise of a House, Lands appurtenant to it will not pass (1). If one have a House, and Land used with it, and he deviseth the House *cum pertinentiis*; it was held, That the Land did not pass by this Devise: But if it had been *cum terris pertinentibus*, it might have passed by that Devise (2). (1) Cro. 3. 704. (2) Cro. 1. 41.

One having two Closes (that originally were but one) called by the name of the *Spring-Closes*, by his Will devised a Close called *Spring-Close*: And it was held, That by this Devise only one of these Closes shall pass, by the Judge on the Bench. But the Jury found both to pass, and the Judges suffered it to pass without any rebuke of them for it (3). (3) Clayton Rep. Case 175.

A. seised of Lands had two Daughters, and devised the Lands to the eldest and her Heirs, that she pay to her Youngest Sister yearly 30*l*. It was the Opinion of all the Justices, That this was a Condition, for so was the intent of the Devisor: For otherwise the younger Sister had no remedy for the Rent *q*. And in this Case it was adjudged, That the younger Sister might enter upon a moiety of the Land, for breach of the Condition in Non-payment of the Rent, for which the Action was brought. (q) Trin. 30. Eliz. B. R. Crickmere & Paterfon's Case Cro. 3. part. 146. & Hugh. ibid.

A man had Issue a Son and a Daughter, and he devised his Lands to his Son in Tail; and if he died without Issue, it should remain to the next of his name. The Son died without Issue, the Daughter being then married. The Question was, Whether she should have the Lands? It was resolved by the whole Court, That she should not, for that she had lost her name by her Marriage: But if she had not been married at the time of her Brother's death, she should have had it, for she was the next of name. (r) Mic. 30. El. B. R. Bon & Smiths Case. Cro. 3. part. 532. vid. Trin. 39 Eliz. C. B. Jobson's Case. Cro. 3. part. 576. Adjudged acc.

A. B. seised of Lands in Socage, devised the same by words to his three Sisters; a stranger present recited the Testators words to him, whereat he affirmed the same. Afterwards the stranger for his own remembrance puts the words into Writing, but read them not to the Devisor before his death. This Devise so reduced into Writing *modo & forma*, is void, because it was written without the order or direction of the Devisor, and consequently

sequently not within the Statute. But if after the writing thereof he had read the same to the Devisor, and thereupon the Devisor had affirmed the same, it had then been a good Devise. It was the Opinion of, &c.

(1) Pasf. 30. El.

B. R. Nash & Edward's Case Leon. 113. It was the Opinion of the whole Court, That the Devise was void, and Wray Chief Justice said, That if he appoint A. to write his Will, and it is written by B. the Devise is void. But if after he had written the Will, he had read it to the Devisor, and he confirmed it, it had been a good Will. It was the Opinion of the Court, That the Plaintiff being Heir at Law, should have Judgment to recover the Lands against the three Sisters.

(2) Trin. 30.

Eliz. Rot. 1160

Whisker &

Cleyton's Case.

Leon. Rep. p.

156.

A. deviseth his Lands to W. after the decease of his Wife, and if he fail, then he willeth all his part to the discretion of his Father, and died. W. survived, the Father being dead before, without any disposition of the Land: In this Case, the Father hath a Fee-simple, there being no difference where the Devise is, That J. S. shall do with the Land at his pleasure, and the Devise thereof to J. S. to do with it at his discretion.

A man seised of Lands in A. hath Issue four Daughters, A. B. C. D. and devised all his Lands in A. to A. and B. two of his Daughters, and made them his Executrices: Afterwards he purchased other Lands in A. A stranger being desirous to buy this Land of him newly purchased, he refused, saying, That this Land should go with the residue of his Land to his Executors, as his other Lands should go. Afterwards the Testator made a Codicil, and caused it to be annexed to his Will; but in the Codicil no mention was made of this new purchased Land: In this Case, this new purchased Land shall not pass; for notwithstanding that the reading of the Will, and the making of a Codicil, may amount to a new Publication, yet it doth not manifest the intent of the Devisor to be, that more shall pass by that than he intended at the first: Also, the new reading of the Will, and the annexing of a Codicil, may not properly be termed a new Publication: And without an express Publication for this Land newly purchased, this Land shall not pass.

(u) Hill. 43.

Eliz. B. R.

Beckford and

Farnecoles Case

Goldsb. 150.

vid. Bret and

Rigden's Case.

Plow. Com.

340.

A man let several Houses and Lands by several Leases for years, rendering several Rents, amounting to 10 *l. per annum*, and made his Will in this manner; viz. I bequeath the Rents of D. to my Wife for life, the Remainder over in Tail. By this Devise the Land it self shall pass; for it appears, his intent was to make a Devise of all his Lands and Tenements, and that he intended to pass such an Estate, as should have continuance for a longer time than the Leases should endure; and the words are apt enough to convey the Lands, it being an usual manner of speaking of some men, who name their Lands by their Rents.

(w) Mich. 45.

Eliz. in C. B.

Ror. 125. Ker-

ry & Dirick's

Case. Cro.

part. 104.

Hugh. Abr. tit.

Devise.

A man devised Lands to another man and his Heirs: The Devisee died in the life of the Devisor, and then the Devisor died: In this Case, the Heirs shall not take by the Devise; for that the Heirs are not named as words of Purchase, but only to express and limit the Estate which the Devisee should have; for without these words [*Heirs,*] the Devisee could not have the Fee-simple: And the Heirs are named only to Convey the Lands in Fee-simple, and not to make any other to be Purchaser but the Devisee x.

(x) Vid. Plowd. Com. 342. in Bret. & Rigdens's Case.

A man made his Last Will and Testament, and thereby did devise his Goods, and also devised Lands to others; made his Executors and died: The Heir of the Devisor brought a Prohibition, to stop the Probate of the Will in the Ecclesiastical Court, and afterwards a motion was made for a Consultation. After divers Arguments at the Bar, the Case was argued at the Bench. *Berkley* and *Jones* were for the Consultation, and *Crooke contra*. The reasons for the Consultation were, That it would otherwise be mischievous; for if where Lands are devised, the Probate of the Will should be stayed by a Prohibition, and no prejudice to the other Party; for the Probate in the Ecclesiastical Court is of no force at the Common Law for the Lands, *vid. Regist. in Bre. de Tenement. Legat.* Where Lands were devised at the Common Law, the Will was first proved in the Ecclesiastical Court, and afterwards in the Village where the Lands lay. But *Crooke contra*, relying on the *Marquess of Winchester's Case* in *Co. Par. 6.* But that was answered by *Jones* and *Berkley*, That in that Case there was a Consultation: And in the Case in question a Consultation was granted.

Mich. 10. Gar. B. R. Rot. 13. Case *Netter* versus *Brett*. Jones Rep.

C H A P. IX.

Certain Cases touching Devises of Land in Fee-simple.

1. *A Fee-simple may pass by several Words and Expressions in a Will, which will not pass it by Deed.*
2. *A power to sell Land devised, passeth the Fee-simple; so doth the Devise of the Land (without other words) on the least Consideration of a payment to be made by the Devisee.*
3. *A Fee-simple will pass in a Will, as well by the Implication as Expression of the word [Heirs.]*
4. *A nice Distinction between Joynt-Tenancy, and Tenancy in Common.*
5. *A Devise of Lands to a Corporation for life, is a Fee-simple; and whether it may pass by the word [Assigns,] without the word [Heirs,] or the words [For ever.]*
6. *A Fee-simple passeth in a Will by Implication of a power to sell the Lands, as well as by payment of money, enjoyn'd the Devisee.*
7. *In what sense the Habendum shall be construed, where the Devise of Lands seems somewhat doubtful.*
8. *In what Case a Fee-simple, and all the Testators Inheritances may pass by general words to the Devisee.*
9. *A Devise in Fee made to one, cannot in the same Will be made to another.*
10. *How the word [Paying] doth create a Fee in a Devise, and how by a Devise of Rents the Land it self doth pass.*
11. *A Devise shall be for the Devisees benefit, not prejudice; also in what other Case a Fee shall pass by Implication.*
12. *In what Case, and by what words the Fee, and not Leases, or the Leases, and not Fee, do pass by a Devise.*
13. *Other Cases in Law touching this subject.*

1. **T**Here are many Words and Expressions whereby Lands will pass in Fee simple by a Will, which by a Deed will not to convey the same. As suppose a man devise his Land in this manner; *viz.* I give my Land in Dale to *A. B.* and his Heirs, or to *A. B.* in Fee, or to *A. B.* for ever, or to *A. B.* *Habendum sibi & suis*, or to *A. B.* and his Assigns for ever, or to *A. B.* to give away, or sell, or do therewith at his pleasure: All these and such like in a Will create a Fee-simple Estate, and *A. B.* shall have the Land to him and his Heirs for ever; (a) yet by such words in a Deed no more will pass than an Estate for life, save only

(a) Lit. Bro.
Sect. 133. Perk.
Sect. 1. 6. Lit.
Sect. 586. Kel.
way 43. Co.
sup. Lit. 19.
20 H. 6. 35.
Lit. Br. Sect.
432 19. H. 8.
16.

only in the first Case. Also if any now since the making of the Statute of Uses, devise that the Feoffees of his Land shall be seised of the Land to the use of *B. C.* and his Heirs, or to the use of *B. C.* and the Heirs of his Body; or that his Feoffees shall make an Estate of the Land to *B. C.* and his Heirs, or to him and the Heirs of his Body: This is a good Devise of the Land in Fee-simple, or Fee-tail. There are also several other ways of Fee-simple by Will. For suppose Land be given to a man *Habend. sibi & Hæredi suo*: This indeed is not Fee-simple; otherwise it is, if it be given *sibi & duobus Hæredibus suis tantum.* (b) So if Land be given to a man *Habend. sibi & Hæred.* with warranty of the Land *sibi & Hæredibus suis*: This is a good Fee-simple. (c) Or if a man Devise Land to *A. B.* for his life, and after to the Heirs, or to the right Heirs of *A. B.* By these Devises *A. B.* hath a Fee-simple in the Land. (d) Also if one devise his Land to his Wife to dispose thereof at her Will and Pleasure, and to give it to one of his Sons: By this Devise she hath a Fee-simple; but it is qualified, for she must convey it to one of her Children, and cannot convey it to another. (e)

(b) Dyer Lect. in Stat. Wills cap. 5 §. 1.
(c) Ibid.

(d) Dyer ubi sup. cap. 3 §. 3.

(e) Co. 6. 16. & Dyer 126.

2. When in a Will power is given to a Devisee of Land by the Testator to sell that Land, such Devisee hath a Fee-simple in that Land; for power to sell, giveth by Implication an Estate in Fee-simple. (f) Also, if one Devise his Land to *A. B.* paying 10 *l.* (without other words:) By this the Devisee hath the Fee-simple of the Land, albeit 10 *l.* be not the hundredth part value of the Land. In like manner, if one devise Land (whereof he is seised in Fee) to *A. B.* paying 10 *l.* to *C. D.* By this Devise, albeit there be no Estate expressed, yet *A. B.* hath the Fee-simple of the Land in respect of the payment of the money. (g) This holds true only in case the intent of the Testator doth not appear to be otherwise.

(f) 13 Jac. B. R. Green vers. Dewel.

(g) Mich. 13 Jac. B. R. Dyer Sect. 307.

(h) Hil. 7 Jac. B. R. Adjudged, Spicers Case.

3. If one in his Will devise his Land to his Wife in the first place, and then saith my Will is, That my Son *A.* shall have it after my Wife's death, and if my Wife die before my Son *B.* that then my Son *A.* shall pay to *B.* 10 *l.* by the year during the Life of *B.* and also an 100 *l.* to *J. S.* In this Case *A.* shall have the Fee-simple of the Land. (b) Also if one devise his Land in this manner; viz. (i) I give *Whit-acre* to my eldest Son and his Heirs for his part: they are Tenants in Common. But if I give *White-acre* to *A. B.* Item, *Black-Acre* to *A. B.* and his Heirs: By this Devise *A. B.* shall have the Fee-simple as well of *White-acre* as of *Black-acre.* (1)

(i) Trin. 30. Eliz. If I devise Lands to two equally divided between them, viz. two, equally to be divided between them by J. S. Till

such division be made they are Joynt-Tenants. Mich. 31 Eliz. in *B. R.* Dickens and Marthorpe Case. Goldsbr. 182. (1) Trin. 13. Eliz.

(k) Adjudged
Lowen verfi.
Cox. Mich. 37
& 38 El. Com.
B. Dyer 25.
Lit. Bro. Sect.
133. Lit. 283.
Perk. §. 170.
Dyer 350.
(l) Dyer 326.
(m) Pafe. 9. Jac.
Newmans Cafe.
Brown. Rep. 1.
part. 131. 169.
(n) Goldsb. 141.
141. Plow. 53.
(1) mo. cafe
759
(2) mo. cafe
804.
(o) Dyer Le-
cure in Stat.
of Wills. §. 5.
§. 13.
(p) Hob. Rep. 7.
(q) Brown. 129.
147. 149.
1 part. & part.
2. 272.
(r) Co. sup. Lit.
9. Perk. Sect. 57
239. Terms of
Law. tit. De.
Devisé.
(s) Trin. 2 Car.
in B. C.
(t) Hil. 13 Jac.
B. C. Blanford
verfi. Blandford,

4. If a man devise his Land in this manner: *Item*, I give to *A. B.* and *C. D.* and their Heirs my Lands in *Kent* equally, or my Lands in *Kent* equally to be divided: By these words *A. B.* and *C. D.* shall have and hold the Land not as Joynt-Tenants, but as Tenants in Common, so that the Heir, and not the Survivor shall have his part that first dieth; And yet in Case of such a Limitation by Deed it is otherwise. But if one devise his Land to *A. B.* and *C. D.* and their Heirs (without more words) it seems that by this Devise, they shall take and hold as Joynt-Tenants. (k) Yet if one devise Land to *A. B.* and *C. D.* and the Heirs of either of their Bodies lawfully begotten, It seems that by this Devise *A. B.* and *C. D.* shall take and hold as Tenants in Common, and not as Joynt-Tenants. (l) Likewise the Case is the same, if one devise his Land to *A. B.* and *C. D.* in this manner; *viz.* I will that *A. B.* and *C. D.* shall have my Lands in *Kent*, and occupy them indifferently to them and their Heirs. (m) But if one, who hath two Daughters only, give or devise his Land to them in Fee: By this Devise they shall take as Joynt-Tenants, and not be in by Descent as Partners; (n) for the Testators Will shall take place. But if a Devise be to two equally of Land: By this they shall not be Joynt-Tenants, but Tenants in Common. (1) Or if a Devise be to a mans three Children equally to be divided, they are Tenants in Common for life. (2)

5. If Land be given to the Mayor and Commonalty of *London*, or any other Corporation, to have and to hold for term of their lives, it is a Fee-simple. (o) Or if a man say, I give to *A. B.* my House, with all the Lands for 21 years; and that *A. B.* shall have all my Inheritance, provided it be not contrary to Law: In this Case *A. B.* shall have the Fee. (p) Or if he give it to his right Heirs males, and Issue of his Issue of his name, this also is a Fee-simple. (q) And although it be affirmed by some, That if the Testator devise his Land to *A. B.* and his Assigns, without saying, [For ever,] *A. B.* shall have an Estate only for life; (r) yet the contrary is asserted by others, and that it is a Fee-simple. (s) And if one devise to another *in perpetuum*, it is a Fee, without the word [Heirs] (3)

6. If a Testator saith, I will my Land to my Son *A.* during his life, and after his decease to my Son *B.* And in case my Son *A.* shall hereafter purchase Lands of as good value as that Land for my Son *B.* that then my Son *A.* shall sell the Land devised to my Son *B.* as his own, and shall pay 20 l. to *C. D.* In this Case *A.* hath a Fee-simple, implied by the power which *A.* hath to sell, beside the payment of money. (t) Also if one devise Land to me and my Heirs; and in Case the Heir at Law put me out, that then I shall have other Land instead thereof: In this Case, and by this Devise,

(t) Mich. 18.
Jac. B. C. Green.
verfi. Dewel.

Devise, I have the Fee-simple of the first Land, notwithstanding the latter words. (u) Likewise if a Testator devise Land to me for (u) Pasch. 14. my life, the Remainder to his own Son, and the Heirs males of Jac. in. B. R. his Body, and in default of such Issue, the Remainder to the next Heir male of the Testator, and the Heirs male of his Body: In this Case the next Heir male of the Son hath an Estate in Fee-simple (w). (w) Perk. Sect. 567.

7. Suppose a man seised of Lands, make his Will in this manner; viz. *Imp.* I devise to my Wife *Black-acre* for her life, the Remainder to my Son *T.* in tail. *Item,* I will to my Son *T.* all my Lands in *D.* also all my Lands in *S.* also my Lands in *V.* Also I give to the said *T.* my Son all my Island, or Land inclosed with water, which I purchased of *J. S.* to have and to hold all the said last before devised premises to the said *T.* my Son and the Heir of his Body: In this Case, the *Habendum* shall extend to all the Lands in *D. S.* and *V.* and shall not limit the Devise only to the Island; because the thing last devised by the Will was an Island in the singular Number, which cannot answer to the *Habendum* in the plural, which is extensive to the Island only, *T.* then should have but for life in the Lands of *D. S.* and *V.* But it was otherwise resolved; viz. That the *Habendum* should extend to all the Lands in *D. S.* and *V.* (x) Trin. 28 El. in C. B. rot. 1458. Wife-man and Wife-mans Case. Leon. Rep. 57. 58.

8. A man seised of a Messuage holden in Socage, in Fee, devised the same by these words: I devise my Messuage where I dwell to *A. B.* and her Assigns for ten years, and *A. B.* shall have all my Inheritances, if the Law will: In this Case, the Devise in Fee of the Messuage is good: and by the words of the Will, all his Inheritances do also pass. (y) Mic. 111. Jac. in C. B. Wedlock and Hardings Case. Godbolt. 208.

9. If a man devise Lands to one for ever, there he hath a Fee; for such an Estate might be conveyed by Act executed. But if he further devise, That if the Devisee do such an Act, that then another shall have the Land to him and his Heirs, the same is void; for when as he hath disposed of the Estate in Fee to one, he hath not power after in the same Will to dispose the same to another, it being a Rule in Law, That such an Estate which cannot by the Rules of the Common Law be conveyed by Grant executed in his life-time by Advice of Council learned in the Law, such an Estate cannot be devised by the Will of a man, who is presumed to be void of Council. (z) Co. 1. part 85. in Corbet's Case.

10. A man having Lands in Fee-simple, and Goods to the value of 5*l.* only, devised to his Wife all his Estate, paying his Debts and Legacies: His Debts and Legacies amounting to 40*l.* It was adjudged in this Case, That all his Lands did pass by the Devise, and that the Devisee had a Fee-simple in the Lands, the word [*paying*] enforcing it; for they are to be paid presently,

(a) Trin. 1651. which cannot be, if the Lands pass not in Fee. (a) And if a man deviseth all his Rents : It was held, That all his Lands do pass. (b).

Johnsons Case.

Styles 293.

Mich. 45 Eliz. to the value of 3 l. *per Annum* be devised to A. and that A. shall pay out of it 50 s. *per Annum* : In this Case A. hath but an Estate for life, for he may pay it out of the profits of the Lands, and is sure to be at no loss. But if it be devised to B. for life, the Remainder to A. paying 50 s. *per Annum* out of it : In this Case A. hath a Fee-simple by Implication ; because after the payment thereof A. may die, before he can receive satisfaction for the same out of the profits of the Land ; and therefore such Devise shall be a Fee simple, because the Law intends that the Devise was for the benefit of the Devisee. (c).

(b) Ibid.

(c) Co. 6. part.

16. Colliers Case.

(d) Trin.

7 Car. in B. R. Rose and Bartlets case.

Gro. 1. part.

213.

Trin. 14 Jac.

B. R. Mo. Rep.

no. 1164.

(1) Cro. 2. 104.

Kerry vers.

Derrick.

(2) Mo. case

852. Marthal

vers. Marthal.

(3) Mo. case

800.

Derrick vers.

Kerry.

11. Note, That by intendment of Law, a Devise shall be for the benefit of the Devisee, and not to his prejudice : As if Land to the value of 3 l. *per Annum* be devised to A. and that A. shall pay out of it 50 s. *per Annum* : In this Case A. hath but an Estate for life, for he may pay it out of the profits of the Lands, and is sure to be at no loss. But if it be devised to B. for life, the Remainder to A. paying 50 s. *per Annum* out of it : In this Case A. hath a Fee-simple by Implication ; because after the payment thereof A. may die, before he can receive satisfaction for the same out of the profits of the Land ; and therefore such Devise shall be a Fee simple, because the Law intends that the Devise was for the benefit of the Devisee. (c).

12. Note also, That if a man hath Lands in Fee, and Lands for Years, and he deviseth all his Lands and Tenements, the Fee-simple Lands pass only, and not the Lease for Years. 2. If a man hath a Lease for Years, and no Free-hold, and deviseth all his Lands and Tenements, the Lease for Years passeth. 3. That if one deviseth his Lands which he hath by Lease, to his Executor for life, the Remainder over, that there ought to be a special Assent thereunto by the Executors as to a Legacy ; otherwise it is not executed. (d) One made Leases of his Lands severally, reserving Rents, and then in his Will said, *As concerning the disposition of all my Lands and Tenements, I bequeath the Rents of D. to my Wife, &c.* and held good ; and that the Land it self shall pass by it. (1) And yet A. seized of Lands in S. in Com. Mid. and of other Lands in E. in the County of S. made two several Leases for years of them unto two several persons, reserving 10 l. Rent upon each Lease. And after he made his Will thus ; *viz. As concerning my Lands, I give and bequeath 10 l. a year in S. in the Parish of E. to my Wife M. during her Life, and after her decease to my Father, and after his decease to my Brother G. And if it please God they die without Issue, then to F. and J. my Brethren. Item, I give to my Wife my House and Tenements in S.* The Defendant married M. and after the years expired, claimed the Lands during the life of his Wife : It was held, that the word [Rent] was not sufficient to convey Land by the *Statute of Wills. Quære.* For it was said it was afterwards adjudged, that it was (2.) But it hath been held, That by a Devise of all the Rent, the Land out of which such Rent doth arise, will not pass by the Statute ; nor as it seems where one hath a Reversion upon a Lease for years, with a Rent incident to it, and he doth devise the Rent for life with a Remainder over ; this will not pass the Rent when the years are expired (3.)

13. *A.* deviseth his Lands in *London* to his Son and his Heirs, after the decease of his Wife ; and in Case his Daughter should survive his Wife, and his Son, and his Heirs, that then the Daughters should have it for life, and after their death *J.* and *R.* should have the same , and that they should pay 6 *l.* 6 *s.* yearly to the Company of Merchant-Taylors, to be disposed of to Charitable Uses : In this Case, three points were argued : 1. Whether the Wife had an Estate for life by Implication of the Will ? And it was resolved, that she had. 2. Whether the Son had a Fee-simple, or Fee-tail ? and it was resolved that he had a Fee-tail by Implication of these words ; viz. [If his Daughters survive his Wife, and his Son, and his Heirs,] whereby it is plainly implied, That the Heirs there intended, are the Heirs of his Body, and not his Heirs in Fee ; for so long as the Daughters live, the Son could not die without a Collateral Heir. 3. What Estate *J.* and *R.* have after the death of the Daughters ? And as to that it was resolved, That they have a Fee-simple, by reason of the Annual payment of money ; and it is not to be regarded what Annual value the Land is of , over and above the sums they pay ; for every sum of money paid or payable doth cause the Devisee to have a Fee-simple. And *Coke* Chief Justice said , That a Devise to *A.* and his Successors, is a Devise of Fee-simple, without the word [*Heirs*] because it implies a Fee-simple , although it wants the exprefs words.

If one devise Lands to *A. B.* and his Assigns , without saying [For ever :] By this it seems a Fee-simple passeth , *Trin. 2 Car. B. R. vid. tamen Co, on Lit. 9. Perk. Sect. 57. New Terms Ley Devise, & More* 434. *Case.* 463. And it is reported in *Child's* Case, That a Devise of Lands to one and his Assigns , is a Fee-simple, and gives him an absolute power to dispose of it. *Cro. 2. 460. in Child's Case.*

One devised Land for life to his Wife, and after that *A. B.* his eldest Son should have it 10 *l.* under the sum or price it cost ; and if he died without Issue, that *C. B.* his second Son should have the Land 10 *l.* under the price it cost ; and if he died without Issue of his Body, then that his two Daughters *D.* and *E.* should have it, paying the value thereof to the Executors of the Wife : In this Case it was held by some, That *A. B.* the Devisee had an Estate-tail, and that the general Limitation, *If he dies without Heirs of his Body*, did not alter the special Tail : But held by most of the Judges a Fee-simple, by the word [paying] which implies a Fee-simple. (1)

(1) *More Case* 471.

One having two moities of Land, the one in *E.* the other in *K.* of several purchases, among other devises, saith thus ; viz. *And as to my moities, I devise all my moities in K. to A. B.* It was held,

held, That by this Devise, both the moities did pass to the Devisee. (2)

(2) Bullstr. 1. 117. *A.* makes a Devise of Land to *B.* his Grandchild, and his Heirs, and if he die during the life of his Mother, then to his younger Brother and his Heirs; this makes a Fee-simple, and not

(3) Styles 258. an Estate-tail. (3)

A. devises Land to *B.* in Fee simple, and after the decease of *B.* then to *C.* Son and Heir apparent of *B.* By this Devise *B.* hath an Estate for life first, the Remainder to *C.* for his life, the Remainder to the Heirs of *B.* in Fee simple. (4)

(4) Dyer 357.

Bullstr. 2. 127.

(5) More, Case

1164. & Case

1098.

A. Devise of Land to one and his Successors, is a Fee-simple, though the Party hath no Body Politick. (5)

If one devise in this manner; *viz.* *I give all my Lands to A. B.* or, *All my Tenements to A. B.* or, *All my Lands and Tenements to A. B.* By this Devise is given not only all the Lands whereof the Devisor is sole seised, but also the Lands whereof he is seised in Common or Coparcenary with another; and not only the Lands which he hath in possession, but also those which he hath in Reversion of any Estate in Fee-simple. And it hath been held, That by this Devise, Leases for years of Land may pass. (6)

(6) Fitz. Devise 4.

Ero. Done 41.

A. devises Land to *B.* for life, and after the next Heir male of *B.* and to the Heirs males of the Body of such next Heir male; By this Devise *B.* hath an Estate only for life. But if it were thus; *viz.* *I give my Land in S. to B.* for his life, and after to the Heirs, or to the right Heirs of *B.* By these Devises *B.* will have the Fee-simple of the Land. And if it be to *B.* for life, and after to the Heirs males of *B.* By this Devise *B.* will have a Tail. (7)

(7) Co. 1. 66.

One deviseth his Land by Will to his Wife to dispose and employ it for her self and her Son; this is a Fee-simple, as if it had been devised to her for ever: But Conditional, so as she may not Alienate it to a stranger; but she must hold it her self, or dispose of it to her Son. (8)

(8) More, case 162.

A Devise of Land was made for 99 years, and after in the Will thus, *viz.* *I devise the Inheritance of my Land to A. my Daughter:* It was held a Fee simple in *A.* without the word [*Heiress.*] (9) Or if a Devise be to *A.* for 99 years, and he shall have all my Inheritance, if the Law will bear it: This also is a Fee-simple. (10) Likewise if one devises his Land for 99 years, and after in his Will saith, *Item, I give to A. all my Lands of Inheritance, if the Law will permit:* By this Devise it is also held, That *A.* hath a Fee-simple. (11)

(9) Co. case 1218.

(10) Hob. 2.

(11) More, case 155.

A. seised of Lands in Fee, devised them *B.* after the death of his Wife; and if he fail, then he willeth all his part to the discretion

crétion of his Father, and dieth : It was held, That by these words (12) Trin. 36
the Father had a Fee-simple, as if it had been said, that he should
do with the Land at his pleasure. (12) El C.B.
Whisker &
Clayton's Case
Leon. 156.

A devise of Lands was made to the eldest Son on Condition,
That if he pay not the Legacies to the younger Children, then (13) Cro. fo.
to them in Fee; He pays not the Legacies; and held, they should 833. Hainf-
have the Fee, and the Devise was good (13) worth vers.
Pretty, & fo.
919. inter cofd.

One seized in Fee of Lands in *A. B.* and *C.* the Lands in *C.*
being in him by way of Mortgage, and forfeited : He deviseth
his Lands in *A.* and *B.* to several persons and their Heirs, and
gives divers Legacies, then saith, *All the rest of my Goods and*
Chartels, Mortgages, Estate, I give to my Wife, after Legacies
paid: And held a good Devise, and that the Fee passed by it. (14) (14) Cro. 3.
447. Wilkin-
son vers.
Merryland.

If one devise Land in Fee, and after devise a Rent out of the
same Land to another, both these Devises shall be construed to be
good, and not repugnant. (15) (15) Lane 118.
Plow. in Bret. &
Rigden's Case.
(16) Anderf.
1. 35.

A man says in his Will, *I devise my Land to A. for 100 l.*
which I owe him: This is a Fee-simple. (16)

One devised his Land to his three Sons, and the Heirs of their
Bodies begotten, and if one of them die, to be divided by equal
portions : The two who survive shall be next Heirs : They are
Tenants in Common. But if the Devise be to them to be divided
by his Executors, they are Joynt-Tenants until the Division be
made. (17) (17) Leon. 3.
12.

One devised, That his eldest Son, with his Executors, should
take the profits of the Lands till his younger Son should come of
the Age of 22 years : It is said, That by this Devise the eldest
hath a Fee simple in all the Lands, till the younger comes to
that age. (18) (18) Leon. 3.
216.

The Testator having Lands let for 99 years, saith in his Will,
I give to A. B. my House, with all the Lands let for 99 years, and
A. B. shall have all my Inheritance, if the Law will allow it : By
this Devise the Inheritance is given to *A. B.* (19) (19) Hob. 7.

If a Testator in his Will saith, *I give my Lands to my right*
Heirs males, and Posterity of my Posterity of my name, part
and part like : By this Devise is given a Fee-simple. (20) (20) Brownl. 1
129, 2. 272.

Between *L.* Plaintiff, and *B.* Defendant, *L.* seized of Land in
Fee, devised it unto two persons, *Equaliter*, and to their Heirs.
Whether this made them Joynt-Tenants, or Tenants in Common,
was the Question ? It was holden by the whole Court, That they
were Joynt-Tenants, and not Tenants in Common. Lowen & Beffa
Case, Anderf.
part 2. Case 10.

A man seized of Lands, devised them by his Testament to
his Wife to dispose and employ them for her and his Sons at her
own will and pleasure. And it was held by *Dyer, Weston,* and
Welch, That she had a Fee by these words, as if he had devised
the

Pasch. 6. Eliz.
Mo. Rep. nu.
162.

Pasch. 17 Jac.
B. R. Spicer
vers. Spicer.

(e) Coke the
Queens Amor-
ney demanded
of the Court;
A man hath
two Daughters,
being his Heirs,
deviseeth his
Land to them
and their Heirs,
and dies. Whe-
ther shall they
take as Joynt-
Tenants by De-
vise, or as Co-
parceners by
Descent? And
all the Justic-
held clearly,
That they shall
have it as
Joynt-Tenants;
for the Devise
giveth it them

the Lands for ever: For the Constrution of Law supplies the defect in these words of the Devisor, according to his meaning. And it was held by *Dyer* and *Welch*, That the Estate in her is Conditional; because these words *ea intentione* make a Condition in every Devise, but not in a Feoffment, Gift, or Grant, unless it be in Case of the King: And these words do amount to as much as to say, she should not convey it away to a stranger, but keep it and give it to his Sons.

S. seised of Land in Fee, holden in Socage, and devisable in *Gavelkind*, devised it to his *Feme* for her life, paying 3 *l. per annum* to T. his Son, during his life; and that he should take but two Load of Wood for Fire-boot: And if she died before the said T. then he devised all his Lands to R. his Son, paying to the said T. 3 *l. per annum*, and paying to such one of his Sisters 20 *s.* and to another Sister 20 *s.* The *Feme* dies, R. enters. The Question was, What Estate R. had by this Devise? (e) And it was adjudged, he had a Fee: For when he devised it to his *Feme* for life expressly, &c. and to R. generally, without limiting the Estate, and appointing him to pay T. 3 *l. per annum* during his life, that carries in it an intendment that he should have Fee, especially when his Father therein further willed, That his Son R. should pay two other Sums in gross, and none of them to be out of the profits, it is by intendment and by implication a Fee; wherefore upon the first Argument it was adjudged for the Defendant; for they said, That these things which have been so often adjudged, ought to rest in peace. *Vide* 4. Ed. 6. tit. Estates. 78. 29 H. 8. Br. Testam. 18. *Dyer*. 371. *Wellock & Hammonds Case*, 32 & 33 Eliz. Cited in *Borastons Case*. Co. 3. 20, 21. and *Colliers Case*. Co. 6. 16.

in another Degree than the Common Law would have given it them, and after the benefit of Survivorship between them. Anonymus Cro. part 3. B. R.

(f) *Dyer's* Read. A man by the premises of his Will, deviseeth his Lands to J. S. on Stat. of in Fee, and by the sequel he deviseeth the same Land to J. N. in Wills. Sect. 3. Fee, they both shall take by this Testament, and shall be Joynt-Tenants. (f)

A Devise made *Canonicis Ecclesie Catholicae Pauli Lond. in perpetuum*, is a good Devise to all the Canons joyntly in Fee, and the Survivor shall have the Entierty; The Law is otherwise in Case of a Devise made *Civitati Lond. in perpetuum*; the Corporation of the Mayor and Commonalty shall take by this Devise. (g)

(g) Ibid. §. 3.

A man hath two Wives, and he deviseeth his Land to his latter Wife in Fee: The first Wife shall have it. (b) Likewise if one hath two Sons called J. and one of them is a Bastard, and born before Marriage, and he makes a Devise to his Son J. the Legitimate J. shall have it, and not the Bastard. (i)

(h) Ibid. §. 16.

(i) Ibid. §. 17.

A man hath Issue a Son, and Land is devised to the Father *Habend. sibi & Hæred. de corpore suo Legitime procreand.* and after the Devisee hath another Son, the second shall have the Land *k.*

(k) *Ibid.* v. 18.

A man seised of three Messuages, devised by his Testament to his Son *A.* one of them, naming it, and *A.* to enter after his Wives death; and devised another of the Messuages to his second Son, paying 10 *l.* to his Sister, and he to enter at the age of 21 years, and devised the third Messuage to his third Son in like manner as to his second Son. And after in his Testament willed, That if either of his Sons died before 21 years of age, that then his part should be divided among the Survivors, and each of them to be the others Heir: They all attain to the fullage, and the two younger Sons paid their Sister the several sums as was appointed in the Will. The Question being, What Estate the two younger Sons had in those Messuages devised them by the Will? It was held a Fee-simple *l.*

(l) *Mic.* 15, 16,
Eliz. Anderf.
Case 100.

A power devised to sell Lands, giveth by Implication an Estate in Fee-simple: So also is it, where the Devisee is by the Will enjoyned to make any payment in gross in consideration of the Lands devised *m.*

(m) *Cur. Mich.*
18 *Jac. B. R.*
Green & Dewel,
vid. More. Case
1168. 1218.
Hob. 65 Anderf
1. 35. 38. 51.
60.

If one devise, That his Executors shall sell his Land, and distribute the profits thereof to pious Uses: This shall be taken for a Fee-simple, and a Conditional Estate *n.*

In a Devise of Lands the Case may be such, that the word [*Heirs*] is not added by the Testator out of any necessity, for the Heir of the Devisee to take by purchase, but only that the Heir of one Devisee deceased, may take part in the Devise with other Joynt-Devisees surviving: For the Case was this, *A.* having four Daughters, *B. C. D. E.* (whereof *B.* had Issue *F.*) devised his Lands to his Wife for life, and after her decease, the same to be equally divided among his Daughters, or their Heirs, and died. The Wife died. The Defendant in the right of *C. D.* and *E.* entered: *F.* the Daughter of *B.* entered into the Lands, and leased them to the Plaintiff. And whether *F.* who was the Daughter of *B.* one of the Sisters, should have a fourth part of the Lands? was the Question. It was the Opinion of the Court, That she should have a fourth part of the Land: For in this Case the word [*Heirs*] was not added of necessity, for the Heir of any of the Sisters to take by purchase; but only to make the Heir of *B.* to take part of the Land. And it was the Opinion of the Court, That it being in the Dis-junctive, it was the stronger for the Plaintiff: For they said, If it were [*And,*] then it would give the three Sisters the Fee; but being in the Dis-junctive [*Or,*]

(n) 18 *Aff. Pl.*
30 39. *Perk.*
104. 147.

(o) Mich. 1 Car there is more colour that she should take a fourth part by the B. R. Rot. 189. Devise (o).

Taylor & Hod-
skey's Case.

Godbolt. 253.

A House was devised to a Woman, and to the Brother of the Woman, and to the Heirs of every of their bodies, and for want of such issue of the Brother and Sister, the Remainder to the right Heirs of the Devisor. The Brother died without Issue: The Sister had issue and died. It was the Opinion of the Court, That the issue should have but a moiety and no more: And it was holden, That the word [*Every*] made and implied several Estates (p).

(p) Mich. 16

El. Dyer 326.

Hartley's Case.

C H A P. X.

Certain Cases touching Devises of Land by way of Entail.

1. *How Lands devised by way of Entail, may happen to be divested out of one, and be vested in another, upon the birth of an Issue in Tail.*
2. *Tenant in Tail may not by any Devise, Condition, or Limitation be barred from Alienating by suffering a Common Recovery.*
3. *A difference in point of Entail, between Devises by Will, and Grants by Deed.*
4. *The several ways of Entails by Devise; with the difference between devising Semini suo, and Sanguini suo.*
5. *The Question whether Issue born or not at the time of making the Devise, may put a difference between an Estate-Tail and Joynt-Tenancy.*
6. *What shall be a Fee-simple by Deed, which is but an Estate-tail by Devise.*
7. *In what Case the younger Son may have Fee-simple, and the elder but an Estate-tail.*
8. *Otherways, how an Estate-tail may be created by Devise.*
9. *Instances of Law for further Illustration of Entails by way of Devise.*
10. *In what Case the word [Or] shall be taken for [And,] to create an Estate-tail by Devise.*
11. *Other Cases of Estate tail by Devise with Cross-Remainders.*
12. *An Estate tail by Devise, with implied Remainder.*
13. *How there may be a Devise of an Estate-tail of Rent as well as of Land; and how a tail limited to some Lands, shall not extend to others therewith devised.*
14. *Law Cases touching this subject.*

1. **A** Man seised of Lands in Fee, devised them to his Wife for life, and after to his two Sons (if they had not Issue males) for their lives; and if they had Issue Males, then to their Issue males; and if they had not Issue males, then if any of them had Issue male, to the said Issue male: The Wife died; the Sons entred into the Lands, and then the eldest Son had Issue male, who afterwards entred: The younger Son put out the issue: In this Case, the Lands by the birth of the Issue males are

(a) Hill. 13 Jac. in B. R. Blanford's Case. Godb. 266. divested out of the two Sons, and vested in the Issue male of the eldest, and he hath an Estate-tail therein (a).

2. A man seised of Lands in *Capite*, devised them to his Wife for life, and after her decease his Son *John* to have it; and if his Son *John* marry, and have by his Wife any Issue male of his Body lawfully begotten, then his Son to have it: If no Issue male, then his Son *Thomas* to have the House: and if *Thomas* marry having Issue males of his Body, his Son to have the House after his decease. And if any of his Sons or Issue males go about to Alien or Mortgage the House, then the next Heir to enter, &c. In this Case, it was, 1. Resolved, That the Sons had an Estate-tail in them severally, and to the Heirs males of their Bodies; for that these words, [If he have no Issue male, his Son *Thomas* to have it,] are sufficient to create tail to *John*, and so of the rest. 2. Resolved, That no Condition or Limitation, be it by Act executed, or by Limitation of Use, or by Devise by Last-Will, can Bar Tenant in tail to Alien by suffering a Common Recovery (b).

(b) Hill. 8 Jac. in the Court of Wards. Sanday's Case. Co. 7. part. 128.

3. If a Devise be made of Land to *A. B.* and the Heirs males of his Body, and he hath Issue only a Daughter, who hath Issue a Son, the Son shall not take by this Devise: Or if such Devise be made to him and the Heirs Females of his Body, and he hath Issue only a Son, who hath Issue a Daughter, she shall not take by this Devise (c). And here note, That in point of Entails there is a difference between Devises by Will, and Grants by Deed; for if a Devise of Land be made to *A. B.* and to his Heirs males, by this Devise *A. B.* hath an Estate-tail: Otherwise it is if such a Limitation be made by Deed, for if one by Deed give Land to another and his Heirs males, by this the Donee hath a Fee-simple, and his Heirs general shall have it (d). But if a Devise of Land be to *A. B.* and to the eldest Heirs Females of his Body, by this Devise all his Daughters, and not one of them only shall have it (e). And if a man devise his Land to his Wife for life, and after to his own right Heirs males, and he hath Issue three Daughters, whereof one after his death hath a Son: In this Case, and by this Devise the next Collateral Heir male of the Devisor, and not the Son of the Daughter, shall have the Land (f).

(c) Terms of Law, tit. Devise. Co. sup. Lit. 25. Plow. 414.

(d) 27 H. 8. c. 17.

(e) Co. sup. Lit. 27.

(f) Trin 9. Jac. Adjudged Cutler's Case.

If a man devise his Land to *A. B.* and to his, or to the Heirs males, or Heirs females of his Body, or of his Body begotten; or to him and his issues male, or his issues female; or to him and the Heirs Male of his Body begotten on *M.* or to him and *E.* his Wife, and the Heirs male, or the Heirs female of their two Bodies begotten; or to him and his Heirs, if he shall have any Heirs of his Body, else that the Land shall revert; or to him, and

and his Heirs if he shall have any Issue of his Body, or to him and the right Heirs male of his Body; or to him and his Heirs, provided that if he die without Heirs of his Body, that then the Land shall revert: By all these, and such like Devises, an Estate-tail may be created of the Land so devised (g) Likewise if one devise his Land in *Dale* to *A. B. & femini suo*, by these words *A. B.* hath an Estate-tail: But if he say, I give my Land in *Dale* to *A. B. & sanguini suo*; it is said, That by this Devise *A. B.* hath the Fee-simple of the Land.

(g) Brown. R.
1. p. 5. & 2.
part. 75.

5. Suppose a Devise be made thus; *viz.* I give my Land in *Dale* to *A. B.* for life, the Remainder to *C. D.* an *E.* his Wife, and their Children; or to them and their men-children; or to them and their Issues: By these Devises (if *C. D.* and *E.* his Wife have no Children at the time of the Devise) an Estate-tail is created, but if they have any Children at the time of the Devise, then hereby is created an Estate for all their lives only in Joynt-tenancy (b).

(h) Sheph. Epic.
c. 155. ver.
Testa. p. 960.

6. If one devise his Land to his Wife for life, the Remainder to his Son; and if his Son die without Issue, not having a Son, that then it shall remain over: This is a good Estate Tail (i). Likewise if Lands be devised to *A. B.* and his Heirs males, or his Heirs Females, without saying [Of his Body] by this Devise *A. B.* hath an Estate-tail: But if such a Limitation be by Deed, it is said to be a Fee-simple (k).

(i) Brownl. 2.
part. 270.

(k) Lit. Sect. 31
H. 6. 25. 27.
9 H. 8. 27.

7. If one having two Sons, devise part of his Land to his eldest Son and his Heirs, another part of his Land to his youngest Son and his Heirs; and if either of them die without Issue, that then the other shall be his Heir: By this Devise either of them hath an Estate-tail, and no Fee-simple. (l) But if one Devise his Land to his eldest Son and his Heirs, and if he die without Heirs of his Body, that it shall remain to his youngest Son and his Heirs: By this Devise the eldest Son hath an Estate-tail, and the youngest Son the Fee-simple (m).

(l) Hill. 22. Jac.
B. R. Daniel's
Case.

(m) Adjudged
Mich. 9. Jac.
Wallop's Case
Anders. 1. 132
2. 17, 18, 19.

8. If one devise his Land to his Son *W. S.* and if he marry, and have an Issue male begotten of the Body of his Wife, then that Issue to have it; and if he have no Issue male, then to the others in Remainder: By this Devise it seems *W. S.* hath an Estate tail to him and the Issues male begotten of the Body of his Wife (n). Also if one devise *Long acre* to *A.* and then say, *Item Broad-acre* to *A.* and the Heirs of his Body: By this Devise he hath an Estate-tail in both Acres (o).

(n) Co. 9. 127.

(o) Trin. 30.

9. If one devise his Land to his Wife for years, the Remainder to his younger Son and his Heirs, and if either of his two Sons die without Issue, &c. that it shall remain to his Daughter and her Heirs, and the younger Son die in the life time of the Father,

Eliz.

ther, and after the Father dieth : It seems by this Devise, the elder Son shall have the Land in tail (p). Or if one devise his Land to his Wife for life, and after to his Son, and if his Son die without Issue, having no Son, (or having no male,) that then it shall go to another : By this Devise the Son hath an Estate-tail to him and the Heirs males of his body (q). Or if Lands be devised to a Man and Woman unmarried, and the Heirs of their two bodies; or to the Husband of *A.* and Wife of *B.* and the Heirs of their two bodies : By these Devises are made Estates in tail (r).

(p) Dyer 122.
(q) Adj. Trin. 7. Jac.
C. B. Robin-
son's Case.
(r) Co. sup.
Lit. 20.
26. Plow. 35.

10. If Land be devised to *A. B.* and the Heirs of his body, and that if he die it shall remain to *C. D.* by this Devise *A. B.* hath an Estate-tail, and the latter words do not qualify the former; but *C. D.* must attend the death of *A. B.* without Heirs of his body, before he shall have the Land (f). Also if Lands be devised to *A. B.* and the Heirs he shall have by *C.* his Wife; by this Devise *A. B.* hath a Fee-tail, and not a Fee-simple (t). Likewise if one devise Land to his Son and his Heirs, and that if his Son die within the age of 21 years, or without Issue, that the Land shall remain over : And the Son dieth within age, having Issue : In this Case, and by this Devise the Son hath an Estate-tail; and [Or] in this place shall be taken for [And] (u).

(f) Adj. 14 Eliz. Trin.
9 Jac. in B. R.
(t) Co. sup.
Lit. 26.

(u) Adj. Mich. 37, 38
Eliz. Sale ver.
Gerard.

11. If a man devise his Land in this manner; viz. I give *White-acre* to my Son *A.* and his Heirs; *Black-acre* to my Son *B.* and his Heirs; and *Green-acre* to my Son *C.* and his Heirs; provided, that if all my said Sons die without Issue of their bodies, that then all my said Lands shall go to *M.* my Wife, and her Heirs : By this Devise they have all of them Estates in Tail of their Land, and as it seems Cross-Remainders to either of them of the Land of each other (w). So that a Devise to three Brothers, and that one shall be Heir to the other, makes Cross-Remainders (1). Also if one devise his Land to *A. B.* and if he die without Issue male of his body, that then it shall remain over to *C. D.* by this Devise *A. B.* hath an Estate-tail (x).

(w) Mich. 18
Jac. B. R. Gil-
bert's Case.
(1) Hob. 34,
75.
(x) Co. 9. 128.

12. If a man having Issue three Sons, devise his Lands in this manner : viz. One part to two of his Sons in Tail, and another part to his third Son in Tail, and that neither of them shall sell his part, but that either of them shall be Heir to other : By this Devise either of them hath an Estate-tail; and if one of them die without issue, his part shall not revert to the eldest, but shall remain to the other Son, for it is an implied Remainder (y).

(y) Lit. Bro.
Sect. 1. 431.
Br. Devise 32.
Done 44.

13. If one devise to *A. B.* that if he and the Heirs of his body be not paid 20 l. Rent yearly, he and they shall distrain, by this Devise *A. B.* hath an Estate-tail of this Rent. Also if a man Devise his Mannor of *D.* to his eldest Son, and also all his Lands in

in *S.* in tail; in that Case the Entail is limited for the Land it *S.* and shall not extend to the Mannor of *D.* But if the words had been, [I devise my Mannor of *D.* and all my Lands in *S.* to my Son in Tail,] the Son had had an Estate-tail in both (*z*). But suppose a man devise his Lands to his Wife for life, the Remainder to his Son in Tail; and if he die without Issue, the Land to remain to *A. B.* and his Wife for their lives, and after their deceases to their Children: In this Case, the Court was divided, Whether the Children of *A. B.* had an Estate in Tail, or only an Estate for life, *Mich. 40 Eliz. in B. R. Goldsbr. 128.*

14. One devised all his Lands to another, and the Heirs of his body begotten, and after in the same Will devised, That if the Devisee die, the said Lands should remain to another in Fee. The Court held, That the Devisee hath notwithstanding an Estate-tail by the first words, and no estate pass'd by the last words.

One devised his Land to *W.* his Son for Term of his life, and after his decease to the Men children of his body: And in case the said *W.* died without any Man-child of his body, that then the Land should remain to another, &c. The Testator dies; *W.* dies without Issue male of his body, &c. and the Question was, What Estate he had? The Justices of the Bench held, that he had an Estate to him and the Heirs males of his body.

F. seized of Land in Gavelkind had three Sons, and devised part to one, part to another, the other part to the third, and if either of them died without Issue, the other should be his Heir. It was adjudged an Entail in each, and a Fee-simple by the words [Heir to the other.] And so it was adjudged *Hill. 32 Eliz. in Carter's Case C. B.*

If a devise be made to one and his Heirs, and in case that he hath Issue a Daughter, that she shall have the Lands: If the Devisee hath Issue a Son and a Daughter, and die, the Son shall have the Land; and although the Daughter afterwards take a Husband, and hath Issue a Son, he shall not eject the other.

If a man devise his Mannor of *D.* to his eldest Son, and also all his Lands in *S.* in tail: In this Case, the Entail limited for the Land in *S.* shall not extend to the Mannor of *D.* But if the words be, *I devise my Mannor of D. and my Lands in S. to my Son in Tail:* In that Case it shall be an Estate Tail in both (*1*).

If one devise *White acre* to *A. B.* and the Heirs of his body; and then after saith thus, *And I will that C. D. shall have Black-acre in the same manner that A. B. hath White-acre.* By this Devise *C. D.* hath an Estate Tail in *Black-acre*, as *A. B.* hath in *White-acre* (*2*). Or if one devise *White-acre* to *A. B.* and then say, *Item, Black acre* to *A. B.* and the Heirs of his body: By this Devise *A. B.* hath an Estate-Tail in both Acres (*3*).

(*z*) Adjudged
1 Eliz. Hugh.
16g. Devise.

Hill. 14 Eliz.
Anderf. Case
84. vid. Case
88. Ibid.

Hill. 6 Eliz. C.
B. Anderf. Case
110.

Mich. 13 Jac.
Spark verf.
Burnel. Mo.
Rep. nu. 1190.

11 H. 7. 13b.
Roll. Abridg. tit.
Devise Lit. K.

(1) 4 Eliz. 2d.
Hugh. Abridg.
643. in Case 5.

(2) 20 H. 6. 156
Perk. Sect. 562
(3) Trin. 30
Eliz.

If.

If one devise his Land to his Wife for years, the Remainder to his younger Son and his Heirs; and if either of his two Sons die without Issue, &c. that it shall remain to his Daughter and her Heirs, and the youngest Son die in the life-time of the Father the Devisor, and after the Devisor dieth; By this Devise it

(4) Dyer 122. seems the elder hath an Estate-tail (4).

A Devise to a man and his Heirs, and if he die without Issue, (5) Heb. 310. that it shall remain, &c. is but an Estate-tail (5).

If one devise all his Lands to another, and the Heirs of his Body begotten; and after saith, That if the Devisee die, the Lands shall remain to another in Fee: By this the Devisee hath

(6) Anderf. 1. but an Estate-tail (6).

33. If Lands be devised to a man and a woman unmarried, and the Heirs of their two bodies: Or to the Husband of *A.* and Wife of *B.* and the Heirs of their two bodies: By these Devises (7) Co. on Lit. 20. 26. Plow. are made Estates-tail (7)

35. If Land be devised to *A. B.* and *S.* his Wife, and to the Heirs of the body of the Survivor of them: By this Devise the Survivor will have a general Estate-tail (8)

(8) Co. on Lit. 26. *A.* devised his Land to *B.* and the Heirs males of his Body, and if he died without Heirs male of his Body, the Remainder to, &c. *B.* died without Issue male of his Body: By this Devise (9) More Case 50. *B.* had not general Tail, but special Tail (9).

If a Devise be made of Land to *J. S.* and the Heirs males of his Body: By this Devise the Sons, and not the Daughters of *J. S.* shall have the Land. And if a Devise be to *J. S.* and the Heirs females of his Body: By this the Daughters, and not the Sons of *J. S.* shall take. And yet it hath been held, That if in the first Case the Devisee hath Issue a Daughter, who hath Issue a Son; or in the last Case hath Issue a Son, who hath Issue a Daughter, that the Son and Daughter shall take by this Devise.

(10) Plow. 414. Co. on Lit. 25. But the Law is otherwise (10).

One having two Sons *A.* and *B.* devised his Land to his Wife for life, and after her death his Land in *S.* to *A.* and his Heirs for ever; and then did Will, That the Survivor of them should be Heir to the other, if either of them died without Issue: The Wife died: *A.* entred to the Land in *S.* And held, That it was an Estate-tail, with a Remainder over: so as *B.* could not after dispose of it. For though the first part of the Will giveth in Fee, yet the second part contradicted, and made it but an Estate Tail (11).

(11) Cro. 2. 695.

If a man hath Issue two Sons and a Daughter, and devise his Land to his Wife for ten years, the Remainder to his younger Son and his Heirs, and if either of the said two Sons die without Issue of their Bodies, the Remainder to the Daughter and her

Heirs.

Heirs. The younger Son dies in the life-time of the Father, and after the Father dies: By this Devise the Daughter shall have a good Remainder, yet it seems the elder Son shall first have an Estate in Tail, by the intent of this Devise (12).

(12) Dyer 122

A Devise to one and the Heirs of his body; and that after his decease it shall remain to another, makes an Estate-tail (13).

(13) More
Case 802.

A Devise to one and the fruit of his body; or *Heredibus Legitime procreatis*, without saying, [*of his body*] is an Entail, More Case 877.

A. in the former part of his Will doth devise Lands to B. and his Heirs, and after in the latter part of the same Will, doth devise the same Lands to the same B. and the Heirs males of his body: By this Devise B. hath an Estate tail in the Lands, and a Fee simple after that (14).

(14) Bulstr. 2.
125. Plow.
540.

If A. devise Land to B. his younger Son, for ever, and after his decease, the Remainder to his Heir male for ever, with divers the like Remainders in the same manner limited to his next elder Son, and his Heir male for ever: By this Devise B. the younger Son hath an Estate tail (15).

(15) Bulstr. 2.
219.

A. Devises Land to B. and to the eldest Heirs females of his body: By this Devise not one, or some, but all the Daughters of B. shall have the Land. In like manner, if A. devise Gavel-kind Land to B. and his eldest Heirs: By this Devise all the Sons of B. shall have the Land (16).

(16) Co. on
Lit. 27.

If Land be devised to one, and the Heir of his body lawfully begotten, it is an Estate-tail (17). Or if Land be devised to the Husband and Wife for their lives, and the longest liver of them, the Remainder to the Heirs of their Bodies: This also is an Estate-tail (18).

(17) Bulstr. 1.
220.(18) Bro. tit.
Estate Pl. 73.

A Devise of Gavel-kind Land is made to three Sons, part to one, and part to another, and that if either of them die without Issue, the other shall be his Heir: This shall be an Entail in every one for his part (19).

(19) More
Case 1190.

A Devise of Land to one and the Heirs males of his body for 500 years, is an Entail, and not a Term---More Case 1067.

If a Devise be made by one to his Wife for her life, and after her decease to his Son A. to have the Land, and if A. have Issue male, that then such Issue shall have it: But if he have not Issue male, that then his Son B. shall have it, with like Remainders to other Sons; and then further saith, *My Will is, That if any of my Sons or their Heirs males, Issues of their bodies, Aliens, then the next Heir to enter, &c.* In this Case, and by this Devise, the Son shall have an Estate-tail (20).

(20) Co. 9.
127.

A. devised Land to B. his Son, and his Heirs, and if B. die within age, or without Issue, then the Lands to be equally di-

divided amongst his other Sons. *B.* had issue, but died within age. It was held, That the Limitation of the Remainder was void, and that the issue had an Estate-tail (21).

(21.) Cro. 1.
525.

If one devise Land to *A. B.* and his Heirs; and after say, And if *A. B.* die without issue, that then it shall remain to his Daughters in Fee: By this Devise *A. B.* hath but an Estate-tail (22).

(22.) Cro. 2.
22. Tuttesham
vers. Roberts.

If one devise Lands to *A.* his Son, after the death of his Wife, and if *B. C.* and *D.* his Daughters do out-live their Mother and their Brother *A.* and his Heirs, then that it shall go, &c. In this Case it was held, That *A.* had by these words but an Estate-tail; for he cannot die without Heir, as long as his three Sisters live, and therefore Heirs here shall be intended Heirs of his body, and not Heirs general (23).

(23.) Bridgm. 86

If Lands be devised to *A. B.* and his Heirs males, or his Heirs females, not saying [*of his body*:] by this he hath an Estate-tail (24).

(24.) Lit. Sect.
2. 9 H.8. 27.

A man seised of Houses held in Socage in Fee, having a Wife, one Son called *Francis*, and three Daughters, devised the Land to *F.* his Son after the death of his Wife, and if the three Daughters happen to over-live their Mother, and *Francis* and his Heirs, then I devise the Houses to them for their lives; and after their deaths I give them to my two Nephews *J.* and *W.* and that they and their Successors shall pay 3 l. Rent yearly to such a Company in London; (viz. Merchant Taylors) for ever; and if they fail of payment, I devise, That the said Company shall have the Houses for ever (25).

(25.) Trin. 14.
Jac. B. R. Webb
vers. Herring
Entr. Hill, 13
Jac. rot. 600,
vel 544. Rol.
Rep. vid. Hill.
14 Jac. B. R.
Rol. Rep.

The first Question was, What Estate *Francis* the Son had by this Devise? For if he had a Fee, then the Remainders are void. It seemed to *Crook*, that he had an Estate-tail, 27 H. 8. A Devise to one and his Heirs male is a Tail, 22 H. 6. A Gift to one and his Heirs, *To have* to him and the Heirs of his body, is a Tail, 25 Aff. pl. 4. A Gift to one and his Heirs, *Habendum* to him and his Heirs, if he hath issue of his body, adjudged a Tail, 27 Aff. pl. 15. And in this Case it would be a Fee in the Son, were it not for the Limitation of the Remainders over: But by such Limitation it appears, the Testators intention was, that it should be a Tail in the Son; for that if it should be a Fee, then the Daughters should have it after the Sons death issueless, without any new Limitation; for the Son could not die without Heir, so long as he had Sisters: And for that the Remainders may be good, it seems to be a Tail, *quod fuit concessum per Coke & totam Curiam*, for the Reasons aforesaid. *Coke*, it is as if one had said, he devises to his Lineal Heirs, and if they die without Heirs, then to his Collateral Heirs: This is a tail. If a man hath two Sons, and devise to the younger, and if he die without Heirs, then to the elder Son in Fee: This is a Tail in the younger Son; for otherwise the

the Remainder would be a void Remainder. *Mingey è contra*, if a Devise be to the elder Son and his Heirs, and if he die without Heir, then the Remainder to the younger Son, that is a Fee in the elder; which was denied by *Coke* for the Reasons aforesaid: But the Court agreed, That if the Devise of the Remainder in this Case had been to a meer stranger, then it had been in Fee in *Francis* the Son, and so a void Remainder, because one Fee cannot be on another. The second Question was, *What Estate the two Nephews* had by this Will? It seemed to *Crook*, that they had a Fee, because they and their Successors were to pay so much Rent for ever, &c. And by the words *Successors* is intended *Heirs, quod fuit concessum per Hought. & Coke*, who said, That a Devise to a man and his Successors is a Fee, *Quod fuit concessum per Croke*: For *Bracton* saith, the Heir *succedit patri*. *Coke*, that words (Paying so much for ever to the Company) gives a power to the Company for ever. And the Condition, That for default of payment, the Company shall have it for ever, shew the intent of Devisor, that it should be a Fee; And it was so adjudged accordingly, in *Hill. 14. Jac. B. R.* As to the former Question it was held *per totam Curiam*, That it was a Tail, and Judgment given accordingly.

A Lessee on Condition, that he shall not Assign to his Wife, doth devise it to his Son after the death of his Wife. It was resolved, That no Estate was given, or did pass to the Wife by that devise; for that then it would be a forfeiture: It would be otherwise were it not for the forfeiture (26).

(26) Trin. 14
Jac. B. R. Webb
vers. Herring,
Roll. Rep.

C H A P. XI.

Certain Cases in Law touching Devises of Land for Life only.

1. *A Devise of Land to one (not saying, How long) is an Estate only for life.*
2. *Power of Distraining devised to one (without other words) on non-payment of a certain Annual sum, is only an Estate for life.*
3. *A Devise of Land to one and his Heir (in the singular Number;) or to one and his Children, is but an Estate for life.*
4. *Several Instances of Law touching Estates only for life by way of Devise.*
5. *Several Instances of Estates for life by Implication devised.*
6. *A Devise of Land to one thereby obliged to a present payment, Creates a Fee-simple: But if payment be to issue out of the profits of the Land devised, it makes only an Estate-tail.*
7. *A Devise of an Estate for life in Reversion.*
8. *A Devise of two Estates for lives; the one to some in being, the other to others in Reversion.*
9. *A Devise of Lands in Esse or Posse, conditioned upon an Annual payment to be made by the Devisee, during his or her life, which Devise is made by one in the Remainder in Fee, and not in Possession, doth pass an Estate only for life.*
10. *A Devise (by general words) of all a mans Estate, Mortgages, &c. may pass (as to the real) no more than an Estate for Life, and not a Fee by Implication.*
11. *The Law ever accommodates the Testators words, whatever they be (as nigh as possible) to his intent and meaning.*

(a) Fitz. Devise 1. **I**F a man deviseth his Land to *A. B.* and say not how long, nor for what time, by this Devise *A. B.* hath an Estate only for life in the Land (a). But if a man devise his Land to *A. B.* and his Assigns, without saying [For ever,] it hath been a Question, Whether he hath only an Estate for life, as was held by some (b); or a Fee-simple, as hath been affirmed by others (c). But if a man hath an Estate to him and his Heirs during the life of *J. S.* This is not devisable, nor can such Estate be devised (1).

2. In the latter part of the last Chapter it was said, That it was an Estate-tail of the Rent, if one devised to *A. B.* that if he and the Heirs of his body be not paid 20*l.* Rent yearly he and they shall distrain. But now if the Devise only be, *That if A. B. be*

(a) Fitz. Devise 111. Goldsb. 183. Bridgm. 105.
 (b) Co. sup. Lit. 9. Perk. Sect. 57. 239. New Terms of Law tit. Devise.
 (c) Trin. 2. Car. B. R. Daniel's Case.
 (1) Hill. 13 Jac. B. R. Cooper vers. Franklin & Waller. Rpl. Rep.

not paid 20 l. yearly, he shall distrain, &c. by this Devise *A. B.* hath only an Estate for life. Likewise if one devise a Rent of 10 l. out of his Land, to be paid quarterly, and say not how long the Rent shall continue: This is but an Estate in the Rent only for life (*d*). (d) Co. sup. Lit. 137. 8. 85.
Blownl. 2. part. 74, 75.

3. If one devise his Land to *A. B.* for his life, or to him (without any more words) or to him and his Heir (in the singular number,) or to him and his Children (he then having Children.) By all these, and such like Devises, *A. B.* hath only an Estate for life in the thing devised (*e*). And if one devise, That *A. B.* shall have and occupy his Land in *D.* (and say not how long :) by this Devise *A. B.* shall have the Land (as aforesaid) only for life (*f*). But if I devise that *A. B.* shall enter into my Land, (and say no more :) By this Devise *A. B.* hath no Estate at all, but power to enter into the Land only (*g*). (e) Fitzh. Dev. 16. Co. 6. 16.
Perk. Sect. 577.
(f) Pasch. 9. Jac. Neuman's Case.
(g) Dyer 342.

4. A man having a Son and a Daughter dies; Lands are devised to the Daughter, and the Heirs females of the body of the Father; by this Devise the Daughter hath only an Estate for her life; for there is no such person, for she is not Heir (*b*). Likewise if one devise his Land in *D.* unto *A. B.* for life, and after to the next right Heir (in the singular number) and to his right Heirs for ever; by this Devise *A. B.* hath only an Estate for life (*i*). Or if one devise Land to *A. B.* for life, and after to the next Heir male of *A. B.* and to the Heirs males of the body of such next Heir male; by this Devise also *A. B.* hath but an Estate only for life. But if he devise his Land to *A. B.* for his life, and after to the Heirs, or to the right Heirs of *A. B.* by these Devises *A. B.* hath the Fee-simple of the Land. And if it be to him for life, and after to his Heirs males, then he hath an Estate-tail. But if one devise Land to *F. G.* and *M.* his Wife, and after their decease (or the Remainder) to their Children; by this Devise, whether they have or have not Children at the time, *F. G.* and *M.* his Wife have Estates only for their lives (*k*). (h) Co. sup. Lit. 24.
(i) Co. 1. 66.
(k) Co. 6. 16.
Goldsb. 138.
Plow. 47. 134.
Plow. 33.

5. If one devise his Land to *A. B.* in Fee, after the death of *C. D.* (being his Son and Heir apparent) by this Devise *C. D.* hath an Estate for life by Implication; and till the Devise take effect, the Law gives it to him by descent. The Law is the same where one doth devise his Land to *A. B.* after the death of his Wife; by this Devise the Wife hath an Estate for life by Implication. But if a Termor of Land devise, That his two Daughters shall have the profits of it after the death of his Wife, and make his Wife Executrix; by this the Wife shall take only as Executrix, and no Estate by Implication---More Case 871. 1028. Yet if a man devise in this manner: I give my goods to my Wife, and that after her decease, my Son and Heir shall have the House where the Goods

are : It is held, That by this Devise the Wife hath an Estate for life in the House by Implication. But if a man devise his Land to *A. B.* after the death of *J. G.* (a stranger to the Devisor) it seems that by this Devise *J. G.* hath no Estate at all by Implication, and that this doth but set forth the time when the Estate of *A. B.* shall begin, and that the intent of the Testator is, That his Heir shall have it until that time (1). The reason of the difference is, because a man is bound to provide for his own, not so for a stranger ; and so the Law presumes what Nature doth teach.

(1) Bro. Devise 48. 52 Lit. Br. 107. 15 H. 7. 13. New Terms of Law tit. Devise. Plow. 158. 414. 52. 1.

6. If one devise his Land in this manner ; *viz.* I give my Land in *D.* to *A. B.* to the intent that with the profits thereof he shall bring up my Child, or my Children ; or to the intent that with the profits thereof he shall pay to *J. M.* 10 *l.* or to the intent that out of the profits thereof, he shall pay yearly 10 *l.* By these Devises *A. B.* hath only an Estate for life, albeit the payments to be made be greater than the Rents of the Land. Otherwise, it is in case the sum of money is to be paid presently, and not appointed to be paid out of the profits of the Land : In which Case, *A. B.* should have a Fee simple in the Land (*m*).

(m) Co. 6. 16. 3. 20. Bro. Estat. 38.

7. If the Father of *A.* be Tenant for life of Land, the Remainder to *A.* in Fee. And *A.* devise the Land to his Wife, rendring for her natural life 5 *l.* to the right Heir of the Father of *A.* by this Devise the Wife of *A.* hath an Estate for life after the death of his Father (*n*).

(n) Dyer 371.

8. Land was devised to Husband and Wife, and after their decease to their Children, they then having Issue a Son and a Daughter. In this Case, the Husband and Wife have but an Estate for Term of their lives, the Remainder to their Children for life, and no Estate-tail ; for the intent of the Testator here shall be construed according to the Rules of the Common Law ; and by the Common Law the Husband and Wife have but an Estate for their lives, with a Remainder to their Children for their lives (*o*).

(o) Hill. 42. Eliz. in B. R. Co. 6. part. 16. 17. Wild's Case.

9. The Son seised of a Remainder in Fee, after the death of his Father, who was Tenant for life, devised the same by these words ; *viz.* I devise to *D.* my Wife the Lands which I have, or may have in Reversion, after the death of my Father, paying therefore yearly during her life, to the right Heirs of my Father 40 *s.* and died, his Father living : It was the opinion of the Court, That no Estate passed by this Devise, but for Term of the life of the Wife, and that she should not pay the 40 *s.* until the Reversion did fall after the death of the Father (*p*).

(p) Mich. 23. Eliz. Dyer. 371.

10. *A.* seised of divers Lands in *A. B.* and *C.* the Lands in *C.* being in him by Mortgage forfeited, devised the Lands in *A.* and

and *B.* to several persons, and then adds this Clause in his Will : All the rest of the Goods, Chattels, Leases, Estates Mortgages, whereof he was possessed, he devised to his Wife, after his Debts and Legacies paid; made his Wife Executrix and died. The Wife entred into the mortgaged Lands, and devised it to the Defendant and his Heirs, and died. The Question was, Whether the Fee passed to the Wife by this Devise, by the name of all his Estate, Mortgages, &c. It was the Opinion of the whole Court, That an Estate for life only passed unto her, and not a Fee by Implication of the general words in the Will (q).

(q) Trin. 10.
Car. B. R. Wil-
kinsons and
Merryland's
Case. Cro. 1.
323.

11. Note, That there is a difference, when one deviseth his Term for life, the Remainder over, and when a man deviseth the Land, or his Lease or Farm, or the Occupation, or Use, or profits of his Land: For in a Will the intent and meaning of the Devisor is to be observed; and the Law makes construction of the words to answer and satisfy his intent, and puts them into such order, that his Will shall take effect. And when a man deviseth his Lease to one for life, it is as much as to say, He shall have so many years in it as he shall live; and that if he dieth within the Term, that another shall have it for the residue of the years: And although at the beginning it is uncertain how many years he shall live; yet when he dieth, it is certain how many years he hath lived, and how many years the other shall have; and so by a subsequent Act all is made certain (r).

(r) Co. 8. part.
65. in Man-
ning's Case.
Pasch. 5. Eliz.
Mo. Rep. nu.
153.

A man made his Will in this manner; [*Item*, I give my Mannor of *Dale* to my second Son. *Item*, I give my Mannor of *Sale* to my said Son and his Heirs:] what Estate he had in the Mannor of *Dale* was the Question. It was held by *Dyer*, *Weston* and *Welch*, That in the first he had but an Estate for life; for that it is as much as to say, as if he would give him his Mannor of *Dale* to him for his life; for that as much is included therein, without saying, [His Heirs.] And that [*Item*] seems a new Gift to a greater degree in the second place to make amends for the other. *Brown's contra*, and that the [*Item*] is a Conjunction Copulative, and the word [*Heirs*] expressed in the latter Clause, extends to both the Mannors. But if the word [*Heirs*] were put in the Gift of the former Lands, it would be otherwise. *Dyer*, if in the first place or clause there were not any person named, but that the words were, [*Item*, I give the Mannor of *D.* *Item*, I give the Mannor of *S.* to *J. K.* and his Heirs,] there and in that Case it would refer to both the Mannors.

VV. C. by his Will devised a Messuage in these words, viz. I give to A. L. my Cousin the Fee-simple of my House; and after her decease to W. her Son. The Judges held, That A. L. had an Estate for life, and her Son a Fee-simple in Remainder. And so it was adjudged.

R. D.

I Pasch. 17 El.
Baker & Ray-
monds Case.
Anders. Case.
251.

Trin. 39. Eliz.
Deacon wcrf.
Marsh. Mo.
Rep. nu. 804.

R. D. seised in Fee of a House, and possess'd of Goods, made his Will in these words, *viz. The rest of my Goods, Lands, and Moveables whatsoever, after my Debris, Legacies, and Funerals paid, to my three Children, L. T. and M. equally to be divided amongst them.* And it was adjudged, That they have an Estate only for life in the House, and are Tenants in Common, not Joynt-tenants.

If a Devise be made to a Daughter for life, and if she marry and have Issue, that her Heir shall have it in Tail; by this Devise she shall take but for her life (f).
(f) More Case 803.

If *A. B.* devise, that *C. D.* after the death of *E. F.* shall have his Land to him and his Heirs; and after in the same Will devise it to *E. F.* for life: This will be a Devise to the said *E. F.* for his life, the remainder to *C. D.* (t).
(t) Bulstr. 2. 127.

If one devise his Land to *A. B.* for his life, and after to the next right Heir of *A. B.* (in the singular number) and to his right Heirs for ever; by this Devise *A. B.* hath an Estate only for life (u).
(u) Co. 1. 66.

A. the Father being Tenant of Land for life, the Remainder to *B.* his Son in Fee: *B.* devises this Land to *C.* his Wife, rendering for her natural life 5 l. to the right Heir of *A.* the Father; by this devise *C.* the Wife shall have an Estate for life after the Death of *A.* the Father (w).
(w) Dyer 371.

If one devise Lands to *F. G.* and *M.* his Wife, and after their decease to their Children: Or to *F. G.* and *M.* his Wife, the Remainder to their Children: In this Case, and by this Devise, whether they have or have not Children at the time: *F. G.* and *M.* his Wife have Estates only for their lives (x).
(x) Co. 6. 16.

One had three Sons *A. B.* and *C.* and three Tenements *D. E.* and *F.* and devised *D.* to *A.* and *E.* to *B.* and *F.* to *C.* but named no Estate; by this Devise they shall have but for their lives only (y).
(y) Bulstr. 2. 180.

A Devise of Land is made in this manner; *viz. Item, I give my Land in A. to B. for life, the Remainder to C. and D. his Wife, and their Children: Or to C. and D. his Wife, and their Men-children: Or to C. and D. his Wife, and their Issues.* By these and the like Devises, if the Husband and Wife have no Children at the time of the Devise, an Estate-tail is created: And if they have Children at the time, then by such Devise, is made only an Estate for all their lives only in Joynt-tenancy. And if Land be devised to *E.* for life, the Remainder to *F.* and the Heirs of his body, the Remainder to *G.* and *H.* his Wife, and after to their Children; by this Devise *G.* and *H.* his Wife have Estates for their lives joyntly. And albeit they have no Children at the time, yet every Child they shall after have, may take by way of Remainder (z).
(z) Co. on Lit. 9. 20. 6. 9.
Keepe. Tail 21.

A Devise of Land upon payment of a sum of Money in gross, creates a Fee-simple; otherwise, if it be upon payment only of an Annual Rent, or bearing a yearly charge with the profits of such Land, or to pay so much to one, and so much to another, out of the proceed or profits thereof, for this is but an Estate for life (a). (a) Co. 6. Colliers Case.

A Devise of Land to one, and if he die having no Son, &c. this an Entail: But a Remainder in this manner; viz. to another for life, and if he die without Issue, having no Son; this is but an Estate for life (b). (b) More Case.

If one devise that his Wife shall have the use and keeping of his Son, and of the Lands devised to him during her life, paying for his maintenance, &c. By this Devise she shall have an Estate for her life (c). (c) Cro. 1. 269.

If one give Land to his eldest Son in Tail, and if he die without Issue of his body, that then all the Right, Use and Possession which the eldest Son hath in the Land to him devised, shall descend and come to his two youngest Sons, and their Assigns; by this Devise the two youngest Sons shall have only an Estate for life, not a Fee-simple (d). (d) Bulstr. 2. 180. 34 H. 6. 7. Lit. Sect. 586.

A. devised his Land to B. his Son, and to the eldest Issue male *de Corpore suo ex eunt*; and for default of such Issue, the Remainder over, &c. In this Case it was held no Tail in B. but an Estate for life only (e). (e) Anderfon 1. 132.

One devised to A. and B. on this Condition, That if he sell it to any but to D. his Son, then he to enter as of his Gift. Item, *All the Houses I have given to my Son, is to this purpose, that they shall bear part and part like, going out of all the Houses and Lands towards the payment of my Wife's 40 l. per annum. And which of my Sons shall refuse to bear their parts, shall enjoy no part of my Bequest.* It was held, That by this A. B. had only an Estate for life, and no Fee-simple (f). But if it were paying such a sum in gross, it might be a Fee simple. (f) Cro. 1. 157. 158.

A. devised to B. the Fee-simple of his House, and after the decease of B. to W. his Son: It was held, That B. had only an Estate for life, and W. the Fee-simple in Remainder (g). (g) Anderf. 1. 51.

If one devise his Land to his Children (without more words) this is but a Devise for their lives (h). (h) Styles Regist. 8.

A devise of the profits of a Term for life, the Remainder over, is good; but no Entail can be made of a Term (i). (i) More Case 1049.

A Devise to A. B. of Lands, to his Issue male *de Corpore suo ex eunt*, is but an Estate for life, the Remainder to his Son for life, and no Inheritance at all (k). (k) Leon. 2. 35.

A Devise of Land to one paying Ten pound (without more words) is a Fee-simple, though the Land be worth One thousand pound.

- (l) *Adjudg. Hill.* pound. Yet a Devise of Land to one for his life paying Ten
 36 *Eliz. C. B.* pound, is but an Estate only for his life (l).
Bridgma. 138. One having two Sons, and two Houses, deviseth one of the
 29 *H. 8. Test.* Houses to one of his Sons, the other to the other; and if either
 18 *Co. on Lit.* of them die without Issue, the Survivor to have that part: By this
 9. Devise they shall have an Estate only for life, and not a Fee (m).
 (m) *Bulstr. 2.* A Devise of Land to *A. B.* (without more words) or to
 108. him and his Heir (in the singular number) or to him and his
 Children (he then having Children:) or to him and his
 Successors (in a private, not Politick capacity:) By these and the
 (n) *Fitz. Dev.* like Devises, *A. B.* hath only an Estate for life (n). Otherwise if
 16. *Co. 6. 16.* the Devisor had only a Term of years, and say not for what time
Perk. Sect. he doth devise it; in that Case it seems, the whole Term will
 577. pass by such Devises aforesaid, unless the Testators intent appear
 to the contrary.
 A Devise of Land to one and his Assigns (without other
 words) is but an Estate for life (o); but to him and his Assigns
 (o) *Co. on Lit.* for ever is a Fee-simple (p).
 94. 29. *Bulstr.* If one devise, That *A. B.* shall have and occupy his Land in
 2. 180. *D.* (without saying how long) he shall have it for his life (q).
 (p) *Ibid.* But if in his Will he saith, *That he shall enter in his Land only,*
 (q) *Pasch. 9* he hath no Estate at all (r).
Jac. Newman's
Case.
 (f) *Co. on Lit.* One having a Son and Daughter dies, Lands are devised
 24. *Anders. 1.* to the Daughter, and the Heirs females of the body of the Fa-
 161. 179, 188. ther: By this Devise, the Daughter hath only an Estate for
 306. her life (f).

C H A P. XII.

*Certain Cases in Law touching Devises of Leases,
or for a Term of years.*

1. *In what Case the word [Shall] is taken for [Should] in Devise of a Term.*
2. *A Devise of Lands for 99 years, may be only for no more of that Term, than the Issue male of the Devisee shall continue.*
3. *The Devise of a Term to one and his Heirs, shall go to the Devisees Executors or Administrators, and not to his Heirs.*
4. *Chattel-Leases and Leases for years, pass not by a Devise of all his Lands and Tenements.*
5. *By a Lease for years devised for life, doth pass the whole Term, yet is it not an Estate for life.*
6. *The whole interest of a Lessee in his Lease Lands, doth pass by a Devise of his Lease, Term, Farm, Profits, Tenure, or or Occupation thereof, as well as by any other words.*
7. *The residue of a Term, is as the Term it self.*
8. *A man may devise such an Estate by Will, which he cannot make by Act executed: Or he may Create in Interest by his Will, which by Grant or Conveyance in his life-time he could not do.*
9. *That may be the Devise of a Lease for years in Law, which doth not seem to appear such in Fact.*
10. *The whole Term, though not named, shall pass by a Devise, where no other can pass by Implication.*

1. **I**F one devise his Land unto his Executors until his Son shall come unto the age of 21 years, the profits to be employed towards the performance of his Will; and when he shall come to that age, that then his Son and his Heirs shall have it. By this Devise the Executors shall have it until he be of 21 years of age; and if he die before that time, the Executors shall also have it until the time he *should* have been 21 years of age, if he had lived so long; and the word [*Shall*] in this case is taken (a) Co. 3. 22. for [*Should.*] (a) Likewise if one devise his Land to his Executors for the payment of his Debts, and until his Debts be paid: By this Devise the Executors have but a Chattel, and uncertain interest, and they and their Executors shall hold it until the Debts be paid, and no longer (b). (b) Co. sup. Lit. 42.

2. If one devise his Land to *A. B.* and the Heirs males of her body for the Term of 99 years; it seems that by this Devise *A. B.* hath but a Lease for so many years, if the Heirs males of his body shall so long continue, and that for want of Issue male the Term of years shall expire. And in this Case the Executor or Administrator, not the Heirs males of *A. B.* shall have it after Case, 87. 46. his death (c).

3. If one possessed of a Term of years, devise the same to another and his Heirs, or his Heirs male: By this Devise the Executors or Administrators, not the Heirs of the Legatee shall have it (d). So that if a Lessee for years of Land devise all his interest therein to his Wife, if she live so long, and after her death, if any part of the Term be to come, devise the same to *A. B.* his Son, and to the Heirs of his body: In this Case, and by this Devise the Executors or Administrators of *A. B.* and not his Heirs shall have it.

4. If a man devise all his Lands and Tenements in *D.* yet Leases for years do not pass by these words; for by Lands and Tenements is intended Frank-tenements or Free-hold, and not Chattels (e). But if a man possessed of a Term, devise his Land to another, that shall be for all the Term absolutely; and so it shall be of a Grant of the Land, or of a Rent out of the Land, 10 E. 4. 18. 27 H. 8. 21. H. 6. 12 E. 3. 11 Aff. A man Leases for years or for life, rendring Rent, that shall go to his Heir. So 38 E. 3. But rendring Rent to himself, the Heir shall have nothing, Pasch. 27 Eliz. Constable's Case, there resolved, a Lessee for twenty years, having leased for ten years, rendring Rent to him, adjudged, That his Executor shall have the Rent, for that he represents the Testators person (1). But if one hath a Term of years in Land, and by his Will devise this Land to another and his Heirs: This is a good Devise of this Land for the time of the Lease (2). For if a man devise all his Lands and Tenements, where he hath some in Fee, and some for years, though this be good only for the Lands in Fee, and not for those he hath only for years; yet if he had no Land there but for years, they shall pass by that Devise (3).

5. If one hath a Lease for years of Land, and devise it to *A. B.* for life: By this Devise the whole Term is devised, and *A. B.* shall have the whole Term if he live so long, and yet *A. B.* shall not have an Estate for life by this Devise. So likewise the Law seems to be the same upon a Grant by Deed made in that manner f. And if a man possessed of a Term of years of Land, devise his Term or his Lease, or the Land it self by a Devise, in either of these words, the whole Term doth pass (g). A Term of years is devised to the Church-wardens of the Church of *D.* and to their Successors:

(c) Co. 10. in
Leonard Lovets
Case, 87. 46.

(d) Co. 10. 6.
Lamper's Case.
Perk. 558.
556.

(e) Eroo. Abr.
Tit. Done, nu.
41.

(1) Pasch. 14
Jac. B. R.
Goffe vers.
Haywood. Rol.
Rep.

(2) Anderf. 2.
17.

(3) Cro. 3. 292

(f) Co. 4. 66.
& 7. 23. Plow.
420.

(g) Brownl.
Rep. 1 part. 41.
45. & 2, part.
108, 309.

Successors: This is not good; but for Goods so devised, the Law is otherwise (*b*). A man who hath a Term, deviseth the Land to one and his Heirs; the Devisee dieth, and hath Executors, his Heirs shall have the Land, and not his Executors: The Law is otherwise, if the entire Term were so devised (*i*)

6. If a Lessee devise his Lease, or his Term, or his Farm, or his Profits, Tenure or Occupation thereof; by either of these Devises, his whole Lease and all his Interest in the Land is bequeathed as well as by any other form of words (*k*). But if a

man devise his Land only for so many years as his Executor shall name, it seems this Devise is not good (*l*). Yet if it be for so many years as *A. B.* shall name, and he name a certain number of years in the Testator's life-time: This is a good Devise. But

if one doth devise, That his Wife shall take the profits of his Land, until the full age of his Son, for his Education and bringing up: This is no interest, but a trust and confidence in the Wife, which is determined by her death, and cannot be transferred over to her second Husband (*1*).

7. A man possessed of a Term of years, may devise all the residue of that Term of years that shall be to come at the time of his death. And if a Testator having only a Term of years in certain Lands, doth devise the said Land to *A. B.* and doth not say for what time, it seems that by this Devise the whole Term is devised, and cannot be transferred over to her second Husband (*1*).

8. A man possessed of a Term of 40 years, by his Will deviseth the same to *J. S.* after the death of his Wife, and that the Wife should enjoy it during her life; and that *J. S.* should neither devise it nor sell it, but leave it to descend to his Son; and in the mean time my Will is, That my Wife shall have the use thereof during her life, yielding 10*l.* yearly to *J. S.* during her life at two Feasts, and made his Wife Executrix, and died. The Wife entred, and paid the 10*l.* yearly according to the Will. In this Case three Points are resolved: 1. That *J. S.* doth not take by way of Remainder, but by way of Executory Devise: And a man may devise such an Estate by his will, which he cannot make by Act executed. And that the Case is no more but this, That after the death of *J. S.* the Wife should have the residue of the Term. 2. The Devise is good, being but a Chatel, which may vest and divest at the pleasure of the Devisor. 3. That there is no difference when one deviseth his Term, the Remainder over; and when a man deviseth his Land, or his Lease, or the use or occupation, or the profits of his Land; that a man by his Will may create an interest, which by Grant or Conveyance he cannot create in his life-time (*m*).

(b) Dyer's
Readings on
Statute of
Wills. Sect. 3.

9. 6.
(i) Dyer ib. 9.
7.

(k) Dyer 122.
33. 128. Co.
1. 83. 6. 42. &c.
Dyer 4. 33.

(l) Plow § 24.
(1) Leon. 2.
221. Cro. 1.
part. fo. 252.
Smith vert.
Havena.

(m) Co. 8. p.
56. Matth.
Manning's

9. A. Case.

(n) Trin. 17.
Jac.C.B.Black-
burn's Case.
Hutton. 36.

9. *A.* devised his Lands to his Daughter and her Heirs, when she came to the age of 18 years, and that the Wife should take the profits of the Land to her use, without any accompt to be made, until the Daughter come to 18 years, and made his Wife his Executrix, and died; provided the Wife should pay the old Rents, and find the Daughter at School: The Wife enters, proves the Will, takes Husband, and dies: It was found, that all the Conditions were performed, and that the Daughter was within the age of 18 years. It was resolved in this Case, That it was a Term for years in the Wife, and a good Lease (n): Whereby it appears, That a Devise to a Daughter and her Heirs, when she attain to the age of 18 years, the Wife in the mean time to take the profits, is a Term for years in the Wife.

(o) Mich. 14.
Eliz. Dyer 307
Anderf. Rep.
Case. 105.

10. A man was Lessee for 40 years of a House, and by his Will gave the House to *J. S.* without limiting any Estate that he should have in it. It was the Opinion of the Court, That he should have the whole; for no other Estate in the House, either for life, or at Will, shall pass by Implication, or for one year or years, and therefore the whole shall pass to the Devisee (o).

A man possessed of a Term of years, devised the same in these words; viz. [*The residue of my Goods, moveable and immoveable I give to my Son John, whom I make my Executor, and to him I give my whole years that I have in my Farm of M. and if he die, I give it to my Daughters.*] *John* the Executor and Devisee proveth the Will, claiming the Lease according to the Will, and dieth Intestate: His Administrator for good Consideration selleth the Lease that remains: Whence the Doubt or Question was, Whether the Daughters or the Assignee should have the Lease? The Case was referred to the two Chief Justices, and Justice *Walmesley*, who all agreed, That the Assignee should enjoy the Lease, and not the Daughters. Q. Whether a Devise to them in such manner be void?

(p) Co. 4. 66.
7. 23. Plow.
520.

(q) Brownl. 1.
41. 45. 2. p.
307, 309.

If one having a Lease for years, devise the same to *A. B.* for life; By this the whole Term is devised to him, and *A. B.* shall not have an Estate for life by this Devise, but he shall have and enjoy the whole Term if he live so long (p). Likewise, if a man possessed of a Term of years of Land, devise his Term or his Lease, or the Land itself: By either of these words or expressions, the whole Lease or Term will pass (q).

A. the Grand-father being possessed of a Term of 22 years to come, devised the Land to *C.* his Grand-son for 21 years, and made him his Executor and died, the Grand-son being within the age of 21 years, *B.* his Father enters into the Land, and makes a Lease thereof for seven years by Indenture, until *C.* the Grand-son come to full age, whom he makes his Executor also,

and dies; C. the Grand-son enters by force of the Devise made by A. his Grand-father. In this Case it was held, that C. the Grand-son had avoided the Lease made by B. his Father (r). (r) Brownl. 2.

If a Testator saith in his Will, *I have made a Lease to A. B. for 22 years, yielding but 20 l. Rent*: This is a good Lease for One and twenty years, though in the *præter tens* (f). (f) more Cases. 101.

If one devise his Term of years to his Son, and after say, That his Wife shall have it during his Sons minority: These are good Devises, and may stand together, and the last shall be taken to go first (i).

If one having Land for years, devise the Land to A. B. By this the whole Term is devised (1). Conformable whereunto is that Case, where a Lessee for years of a House gave it by Will to A. B. but limited no Estate: And it was held, That by this Devise the whole Estate did pass (u). (r) Plow. 541. (1) Anderf. 2. 12.

A Devise was of Land to one for 21 years, and if he die within the Term, that another shall have the like Term, is good. But otherwise it is, if he that deviseth hath only a Term of years in the Land. *Sed Q.* (w). (u) Dyer 307. (w) More, Case. 420.

A Devise to one and the Heirs of his body for 500 years, is but a Term (x). (x) Co. 10. Leonard Loop's Case.

If Land be devised to one for years, and if he die within the Term, that another shall have the residue of the Term, or of the years; No Act of the first can prejudice him in the Remainder (y). (y) More, Case. 403.

One possess of a Lease for years, devised the same to his eldest Son, and the Heirs of his body; and in case he died without Issue, then to the youngest Son, and the Heirs of his body: And for want of such Issue, that the Term should remain to his Daughters: And he died, having only two Daughters, and afterwards another Daughter was born. And it was held, That all the three Daughters should have the Term, although the youngest Daughter was not born at the time when the Devise was made, nor at the time of the Devisors death (z). (z) More, Case. 342.

A Term of years was devised to A. and B. till they had levied 100 l. and after to their own use: And it was held, That they should take as Legatees, and not as Executors (a). (a) Goldsb. 185.

Lessee of Lands for 21 years, devised the benefit of his Lease to M. his Wife for seven years after his death, and that his Son Thomas should (if he return'd home) have (after the expiration of the seven years) the benefit thereof for the residue of the Term: And in case he did not return home, that then his Son William should have it until his Son Thomas came home: And devising to his Wife all his Goods, makes her his Executrix, and dies. William during the seven years makes his Wife his Executrix. The seven years expired, Thomas did not return home, M. the Devisors Widow married

married again: And it was held, That *M.* should have the Term: For though a possibility, yet such a one as might have vested in the Testator (*b*).
 (b) Cro. 2.
 509. Sheriff
 vers. Wrotham.

A Term of years of Land devised by a man to his Wife, to the intent that she may, with the profits thereof, breed up his Children: This no Legacy to them, and therefore cannot sue for it in the Ecclesiastical Court, but must sue in a Court of Equity (*c*).
 (c) Plow. 545. If a Term of years in Land be devised to one, and the Executorship appointed to another, and the Executor having Assets sufficient besides to pay the Testators Debts, doth notwithstanding sell this Term of years: In this Case, albeit the Executors sale be good in Law, and the Devisee of that Term without remedy of recovering the Lease, yet he may sue such Executor for it in Chancery, and recover the value thereof in damages (*d*).
 (d) Plow. 145.

Lands are devised by a man to his second Son for the Term of 20 years, for the payment of his Debts, but if he hapned to die within the said Term of 20 years, that then his third Son should have the residue of such Term as should be then to come of the 20 years. The eldest Son dieth without Issue, the Lands descend to the second Son, who dieth within the 20 years, leaving Issue: In this Case, it was the Opinion of the Court, That the Lands should go not to the Nephew, but to the Uncle: For though the term was extinct in the second Son, yet it was a new Devise to the Third (*e*).
 (e) Cro. 1.128.
 Low vers. Low.

A. devised Lands to *B.* his Wife for her life; and if she live until his Son come to the age of 24 years, that then he shall have the Lands: And if he dies before he come to that age, that then *C. D.* shall have it till his Son come to that age, and died: And then *C. D.* died before *B.* the Wife; After she also died before the Son came to the age of 24 years: And it was held, That the Executors should not have the Lands till the Son came to age (*f*).
 (f) Goldsb. 64.
 Trin. 7 Car. 3.
 R. Rot. 497.
 Rose vers.
 Bartlet. Cro.

In the Case of *Rose* against *Bartlet*, all the Justices (*absente Richardson*) agreed, That if one deviseth his Land which he hath by Lease, to his Executor for life, the Remainder over, that there ought to be a special Assent thereto by the Executor, as to a Legacy: Otherwise it is not executed.

One made a Lease for life, after leased the same to *A.* for 99 years, if he so long lived, to commence after the decease of the Lessee for life. And if *A.* died during the said Term of 99 years, or the Lease otherwise determined, and after the death of the Lessee for life, then the Lessor granted for him and his Heirs, that the Land should remain to the Executors of *A.* for 20 years. Lessee for life dies. *A.* leased for 20 years rendring Rent, and dies intestate. *B.* takes his Administration, and brings Action of Debt for the Rent. It was adjudged, That it doth not lie: For

For it seemed to *Gaudy* and *Yelverton*, That the Contingent of 20 years was never vested in *A*. But if *A*. had made Executors, he might take by way of Purchase, (Executors being a name of Purchase, as in *Cranmers Case*, 14. *Eliz. Dyer*.) But if it had been limited to the Executors for payment of the Debts of *A*. or the like, then by the intent apparent there would be an interest in *A*. and in the Executor for the use of *A. Popbam* and *Fenner* agreed in point of Law as to an Action of Debt.

A man made his Will in this manner; viz. [*I have made a Lease for 21 years to J. S. paying but 20 s. Rent.*] And it was held, That it was a good Lease by the Will. For that Word [*I have*] shall be taken in the present Tense, as in the word [*Debt*] in a Deed of Feoffment. Trin. 3 El. Mo. Rep. nu. 101.

A man seised of a Mannor, part in Demesnes, and part in Lease upon Rent, Suit and Service: Devised by his Testament to his Wife, during her life, all his Lands in Demesnes, and also by the same Testament did Devise to her all his Services and high Rents for 15 years; and further by the same Testament did devise all his Mannor to another after the death of his Wife. And it was agreed by all the Justices, That the Last Devise took not effect for any part of the Mannor till after the death of the Wife, and that the Heir after the Expiration of 15 years, and during the Wives life shall have the Services and Chief-Rents. Trin. 3 Ed. 6. Mo. Rep. nu. 24.

If a man possessed of a Lease for years of Land, devise the same to one for life, the Remainder to another; although the first Devisee hath the whole Estate or Term in him, and no Remainder can depend thereon at Common Law, yet it is a good Devise to the second Devisee by way of an Executory Devise. Mich. 5. Jac. B. inter Mallet & Sir H. Sackford Roll. Abr. tit. Devise.

If certain Lands be devised to one, he cannot take them without the delivery of the Executor. Or if a man be possess'd of a Lease for years of Land, and devise the same to another, the Devisee cannot have it, or enter upon it without the Executors or Administrators consent. 11 H. 4. 84. Trin. 39 Eliz. in Cam. Scac. inter Edmonds & Buskin. Lit. Trin. 39 Eliz. B. R. Roj. ibid. lit. A.

Lessee for 99 years, by his Will devised his Lease in these words; viz. I devise my Lease to my Wife during her life; and after her death I Will, that it go to her Children unpreferred, and made his Wife his Executrix and died. The Wife entred, and married with *J. S.* and afterwards for 240 *l.* Debt recovered against the said *J. S.* and upon a *Fieri Facias* the Term was sold by the Sheriff. Afterwards the Judgment was reversed by Error, *Et quoad omnia quæ amisit ratione Judicii Restituantur*. The Wife Executrix died: In this Case it was resolved: 1. That the Executory Devise of the Lease after the death of the Wife, to the Daughter not preferred, was good. (2) That the sale made by the Sheriff upon the *Fieri Facias*, did not destroy the Executory

(1) Mich. 27
Eliz. B. R. Am-
ner & Lod-
dington's Case.

Devise, although the person to whom it was made, was uncertain during the life of the Wife. 3. That the sale made by the Sheriff stood good, although the judgment was reversed, and that the Plaintiff should be restored to the value of the Term, but not to the Term, during the life of the Wife, and the value of the Term should go to the Daughter not preferred, after the death of the Wife (1).

CHAP. XIII.

Law Cases touching Devises of Reversions or Remainders.

1. *What Devise of a Reversion is good, and what Remainder may be devised.*
2. *As the Limitation, so the Devise of a Remainder after a Fee, is void.*
3. *In what Case the Devise of a Remainder of a Chattel-real, may be void.*
4. *The Devise of a void Limitation, is a void Devise.*
5. *A Devise in Remainder of Goods, is void.*
6. *In what Case the Devise of a Remainder over in Fee, after Lease for life made by Executors, is void.*
7. *The difference between a Remainder entail'd by Devise, and entail'd by Deed.*
8. *A Remainder devised to a Church, accrews to the Parson of that Church.*
9. *A Refusal in one to take by a Devise, shall not prejudice another in Reversion or Remainder.*
10. *How the Devisors Daughters Issue (without naming her) shall have the devised Remainder before the Issue of his Sons.*
11. *A Termor of 100 years to come, deviseth it to one for Life, the Remainder over, it is a void Remainder.*
12. *A Devise of a Remainder in Fee after a Lease, which devise is made by him in Remainder, is a void Devise, if the Lessor-Re-enter.*
13. *Several Cases, wherein he in Remainder may Devise his Remainder.*
14. *Fee-simple devised to one, the Remainder cannot be devised to another, albeit the first Devise were but conditional.*
15. *A Term of years by way of Remainder is devisable; but a devise by way of Entail with Remainder over, is void.*
16. *Lessor.*

16. Lessor may devise the Reversion of Land for life, notwithstanding a Feoffment in Fee.
17. Remainder of a Rent-charge in Fee, may be devised to one, where the Land, out of which the Rent doth arise, is devised to another.
18. A Devise may be good for the Reversion of a Term, where not for the Rent.
19. The Devise of a Remainder may be good, where yet an Estate Tail shall precede.
20. He in Remainder shall take presently, where the Devisee for life is incapable of taking by Devise.
21. Though a man cannot devise to himself, yet he may devise a Remainder to his own right Heirs.
22. A man may devise a Reversion by the name of all his Inheritance or Hereditaments.
23. Devises of Remainders to the next of Blood.
24. Where the Devise of a Remainder after the Remainder makes the former Remainder but an Estate for life.
25. Whether a Remainder devised to one after a Term of years devised to another, who dies before the Devisor be a good Remainder.

1. **I**F a man devise his Land to B. C. for life, the Remainder to the next of Kin, or next of Blood of B. C. this is a good Devise of a Remainder (a). Or if a Lessor disseiseth his Lessee for life, and makes a Lease for life to another for Term of life of the first Lessee, the Remainder over in Fee; though the first Lessee enters, yet he in the Remainder may Devise his Remainder (b).

2. If one devise his Land to A. so as he render 20 s. *per annum* to B. and if he fail thereof, then his Estate to cease, and to remain to B. this Devise is good, but the Limitation of the Remainder is void, because a Remainder cannot be limited after a Fee (c). Therefore if a man makes a Lease for years upon Condition, that if the Lessor disturb the Lessee within the Term, that the Lessee shall have the Fee, and maketh Livery accordingly, and after the Lessor doth disturb the Lessee for Rent, where none is in arrear, and after deviseth his Reversion, this Devise is not good (d).

3. A man possessed of a Term for 40 years, devised that his eldest Daughter should have the same to her, and the Heirs of her body, the Remainder, if she died without Issue within the Term, to C. his second Daughter in Tail. The eldest Daughter took Husband, and died within the Term without Issue: Her Husband sold the Term. It was the Opinion of the Court, That his sale thereof was good, and that the younger Daughter had

(a) Fitz. Devise
27. Plow. 523.
Perk Sect. 509,
510. Bro. Cor-
porat. 55.

(b) Dyer in
Stat. of Wills,
32, & 34. H.
8. Sect 8. §. 1.

(c) Pasch. 29
H. 8. Dyer 33.

(d) Dyer Read.
in Stat. of Wills
Sect. 8. §. 4.

(e) Trin. 28.
H. 8. Dyer 7.

no remedy for it, because it was a void Remainder, being of a Term, which was a Chattel-real, and so is to go to the Husband (e).

(f) 9 Eliz. Dyer
254. Plow.
Com. 190.

4. A Lease was made to A. for 41 years, if he should so long live, and if he died within the said Term, that then his Wife should have it for the residue of the said years. It was held, That the Limitation to the Wife in Remainder was void; for that the Term ended by the death of A. and then there was no residue to remain to his Wife (f).

(g) Trin. 17.
Car. C. B.
Marsh. 106.

5. A man possessed of certain Goods, devised them by his Will to his Wife for life, and after her decease to J. S. and died. J. S. in the life-time of the Wife, did commence Suit in a Court of Equity, there to secure his Interest in Remainder. A Prohibition was granted in this Case; and the Reason was, because a Devise in Remainder of Goods was void, and therefore no remedy in Equity, for *Æquitas sequitur Legem*. It was agreed, That a Devise of the use and occupation of Lands, is a Devise of the Land it self, but not so of Goods; for one may have the occupation of them, and another the interest in them (g).

(a) Dyer's Read
ubi sup. Sect. 3.
§. 2. & 9.

6. Suppose a man deviseth a Reversion, depending upon an Estate for life, to the Parson of D. and to his Successors; if the Parson die, and after a new Parson be made, and the particular Tenant die also, the new Parson shall have it. Also if a man devise Land to one for Term of life, the Remainder over in Fee, and the Devisee for life refuse, yet he in the Remainder may enter; but if the Will were, That the Executors shall make a Lease for life, the Remainder over in Fee, and they offer to make a Lease accordingly; and the Lessee refuseth, he in the Remainder shall not have the Remainder (b).

(i) Dyer ibid.
Sect. 3. §. 12.

7. J. S. hath Issue two Sons, and dieth; the elder hath Issue a Daughter, who hath Issue a Son, and dieth. Land is given by Testament to one for life, the Remainder to the next male of the body of J. S. begotten; the second Son of J. S. shall have the Land, and not the Son of the Daughter: It would be otherwise, if the Remainder were so entail'd by Deed (i).

(k) Ibid. §. 19.
& 21 R. 2 Pl.
Com. 523.

8. If Land be devised to one for life, the Remainder to the Church of D. the Parson of the said Church shall have it (k). And if a man willeth that after 20 years after the death of the Devisor J. S. shall have the Land in Fee; the Heir of the Devisor shall have the Land during the Term, and not the Executor (l).

(l) Dyer ibid.
§. 24.

9. A man deviseth his Land to his Daughter and Heir, being a *Feme Covert*, and to the Heirs of the Woman, the Reversion over in Fee, and dieth; the Husband refuseth to take by the Devise, he in the Remainder entreteth, he shall retain the Land during the lives

lives of the Husband and Wife; but after their decease, the Issue of the Wife may enter upon him (m).

(m) Ibid. §. 22.

10. A man seised of Land in Fee, hath Issue two Sons and a Daughter; the Father deviseth the Land to his Wife for Term of life, the Remainder *propinrioribus de sanguine puerorum* of the Devisor: the Daughter hath Issue and dieth; the Issue of the Daughter shall have this Remainder; and although that the Sons have Issue after, yet their Issue shall not have it (n).

(n) Ibid. §. 23.

11. A man hath a Term of an hundred years to come, and he deviseth this to one for Term of life, the Remainder over to F. S. this is a void Remainder: It were otherwise if the Devise were, that the Devisee shall have the Occupation of the Land during his life, the Remainder over. (o) Or if Lands be given by Will to one in Fee, provided that if he do such an Act, that then it shall go to another in Fee: This is a void Remainder to that other. Or if Lands be given to A. in Fee, and that if he die without Heir, that then it shall remain to B. This is also a void Remainder (1). The Reason is, because a man cannot create a Title, or convey by Will such a Title or Interest, as according to Rules of Law he could not convey by any Act executed in his life-time. For the same reason also, a man cannot by Will direct or appoint an Inheritance to descend contrary to the Rules of the Law: And therefore where a Devise is to one and the Heirs males of his body, and he hath only a Daughter that hath a Son, this Son cannot inherit the Land by that Devise (2).

(o) Ibid. Sect. 4. §. 10.

(1) Co. 1. 85.
4. 7. Dyer 123.

(2) Co. on Lit. 25. Plow. 414.

12. A Lease is made for life, the Remainder over in Fee, reserving Rent by Indenture, and for default of payment, that it shall be lawful for the Lessor to enter and detain during the life of the Lessee; he re-enters for the Rent arrear, he in the Remainder deviseth the Remainder; such Devise of the Remainder is void (p).

(p) Ibid. Sect. 8. §. 6.

13. If Land be given to two persons, *Habendum* to the one for life, and after his decease to the other in Fee; he that hath the Fee may devise his Reversion thereof. (q). Likewise if Land be given to one for life, and that after his death it shall descend to F. S. in Fee, he may devise this Remainder. (r) Or if a Lease be made *dummodo solverit* 10 l. to the Lessor for his life, he may devise the Reversion, with the Rent. Or if a Lease be made to an Infant or Feme sole for life, the Remainder in Fee, and the Infant at his full age, or the Feme after Coverture disagree; he in Remainder may devise his Remainder. (s)

(q) Ibid. §. 10.

(r) Ibid. §. 12.

(s) Ibid. §. 16.
18.

14. If the Fee-simple of Land be devised to one, the Remainder cannot be devised to another, albeit the first Devise be but conditional. And therefore if a man devise his Land to A. B.

in.

in Fee, so that he pay 100*l.* to C. D. And if he fail, that then it shall remain to C. D. and his Heirs, this Remainder to C. D. is void; for upon the failure of Payment by A. B. the said C. D. may not enter, and have the Land, but the Devisors next Heir. Likewise if Land be devised to F. G. and his Heirs, and if he die without Heirs, that then it shall remain to J. M. and his Heirs, this is a void Remainder. Or if a man devise his Land to one for ever; and then further devise, That if the Devisee do such an Act, that another shall have the Lands to him and his Heirs, the same is void. For by devising his Land to one for ever, he devised the Fee; and when he hath disposed of the Estate in Fee to one, he hath not power after in the same Will to dispose the same to another (1).

(1) Co. 1. par.
85. Corbets
Case.

(1) Co. 8. 95.
Plow. 519.

546. 516.
539. & Dyer
277.

(u) Co. 10. 87.
47. Pasch. 17.
Jac. B. R. Child.
vers. Baily.

(w) Dyers
Read. in Stat.
Will. Sect 8.
§. 19.

15. A man may devise a Term of years by way of Remainder, and the first Devisee cannot hinder the second of the Remnant of the Term (1). But yet a man possessed of a Term of years, cannot entail it by his Will: And therefore if a man devise his Term to A. B. and his Heirs, or to him and the Heirs of his body, or to him and his Issue, the Remainder to B. C. this Remainder is void, and the Devise is good for the whole Term of years to A. B. and his Executors (u).

16. A man seised of two Acres in several Towns in one County (that is) of the one for life, and of the other in Fee; and maketh a Feoffment by Deed of all his Lands in the same County, and makes Livery in the Acre in Fee in the name of both, the Lessor (notwithstanding this) may devise the Reversion of the Acre for life (w).

17. If a man grants a Rent-charge out of Lands devisable to one for life, the Remainder over to the Grantor and his right Heirs, and after the Grantor devise the Land to a stranger in Fee and die, the Heir of the Devisor may devise the Remainder of

(x) lb. §. 21. the Rent in Fee (x).

18. A Lease for Term of 100 years is made to a Bishop and his Successors; he maketh a Lease for life, rendring Rent to him and his Successors, and after he deviseth the Reversion with the Rent in Fee; this a good Devise for the Reversion, but not for the Rent (y).

(y) lb. §. 26.

19. If a man having two Sons and a Daughter, devise his Land to his Wife for seven years, the Remainder to his younger Son and Heirs, and if either of the said two Sons die without Issue of their bodies, the Remainder to the Daughter and her Heirs, and the younger Son die in the life time of the Father, and after the Father die: In this Case, and by this Devise the Daughter hath a good Remainder; but it seems the elder Son hath first an Estate-tail by the intent of the Devisor (z).

(z) Dyer 122.

20. If Land be devised to *A.* for life, the Remainder to *B.* for life, the Remainder to *J. S.* in Fee: In this Case (if *B.* be a person incapable of a Devise then) he in the Remainder in Fee shall take presently after the first Estate for life ended. And if the Devise be to a person incapable for life, the Remainder to *J. S.* in Fee, then shall *J. S.* take presently (a). (a) Perk. Sect. 576, 577.

21. If a man devise his Land to two persons by name, and the Heirs of either of their two bodies, and for default of such Issue the Remainder to the right Heirs of the Devisor; after the Devisors death one of the said Devisees dies without Issue, the other Devisee hath Issue, and dieth: In this Case, and by this Devise the Issue of such surviving Devisee shall have a moiety, and no more of the Land (b). (b) Dyer 326.

22. A Lease is made to *J. S.* for the Term of the life of *J. N.* the Remainder to the same *J. N.* for Term of life of the said *J. S.* — *J. N.* in Remainder releaseth all his right to the said *J. S.* and dieth. In this Case, the Lessor may devise the Reversion. And if a man who hath a Reversion, deviseth this Reversion by the name of all his Inheritance or Hereditaments in *D.* it is a good Devise (c). (c) Dyer in Stat. Wills Sect. 2. § 35, 36.

23. If a man having Issue three Sons, *A. B.* and *C.* doth devise his Land to *C.* the Remainder to the next of Blood to the Testator: In this Case and by this Devise *A.* shall have the Land after the death of *C.* as the next of Blood. Likewise if a man having four Daughters, devise his Land to the youngest in tail, the Remainder to the next of Blood: By this Devise the eldest Daughter, and not all the rest shall have the Land after the Estate-tail. Also if a man having two Sons and a Daughter, who hath two Daughters, devise his Land to a stranger for life, the Remainder to his second Son for life, the Remainder in Fee to the next of Blood to his Son: In this Case if the eldest Son die without Issue, the Daughter and her Daughters shall have all the Land.

(d) And if Land be devised to one for life, the Remainder to another for life, the Remainder to the next (or to the nearest) Heirs of the Blood of the Children of the Devisor: By this Devise the Sons and Daughters of the Devisor are excluded (1). (d) Fitzh. Devise. 9. Perk. Sect. 508. (1) Bridgm 15. 30. Aff. 47.

24. If Land be devised to *A.* for life, the Remainder to *B.* and the Heirs of his body, the Remainder to *C. D.* and his Wife, and after to their Children: By this Devise *C. D.* and his Wife have Estates for their lives only, and their Children after them Estates for their lives jointly. And albeit they have no Children at the time, yet every Child they shall have after may take by way of Remainder (e). (e) Co. sup. Lit. 9. Bro. tit. Tail. 21. & Co. sup. Lit. 20. 6. 16.

25. *A.* makes a devise of Lands to *B.* for seven years; the Remainder to *C.* and his Heirs: *B.* dies before *A.* and held the Remainder was good, for the Freehold in the interim vested in the Heir (f). (f) Cro. 1. 50. 378. Pays Case If

If one devise his Land in this manner; *viz.* I give my Land to *A.* in Fee-simple, after his decease to *B.* his Son, who is his Heir apparent. By this Devise *A.* hath an Estate for life first, the Remainder to his Son for his life, the Remainder to the Heir of *A.* in Fee-simple (*f*).

(f) Dyer 357.
Pasch. 44. El.
B. R. Pays Case
Cro. par. 3.

One devised his Land to *J. S.* from *Michaelmas* following for five years, Remainder after to the Plaintiff and his Heirs: He died before *Michaelmas*. The Question was, Whether this were a good Remainder? Because it could not enure instantly by his death; for it may not begin until the particular Estate, which was not to begin till after *Michaelmas*, and a Free-hold cannot be in Expectancy. But all the Court held, That it very well might expect; for in Case of a Devise, the Freehold in the mean time shall descend to the Heir, and vest in him. Wherefore without Argument it was adjudged accordingly, and that the Remainder was good.

Mich. 5 Jac. B.
per Cur. Roll.
Abr. tit. Dev.
Co. 10. Lampet
47. b. Mich.
13 Jac. R. R.
per Dodridg
Roll. ibid.
(1) March 149
(2) March 106
27. Aft. 50
Curia Roll.
Abr. tit. De-
vise lit. F.

If one devise a personal Chattel to one for life, the Remainder over to another, it is a void Remainder. For Testaments made of Goods in Remainder, are not good: As where one gives Goods to his Wife by his Will for her life, and after her decease to *J. S.* This is not good to *J. S.* But where the Devise is only of the use and occupation of Goods, there it may be good by way of Remainder (1). But a Devise of Goods to one for life, the Remainder to another, this Remainder is void (2).

If a man devise a Term to one for life, the Remainder to another for life, with divers Remainders over, The Executors consent to the first Devisee, will be a consent as to all the other Remainders. Or in case a man devise a Term to one, and a Rent thence issuing to another, and dies, the Executors consent to the Devise of the Term is an assent also as to the Rent.

If an Estate be given to the Husband and Wife, and the Heirs of their two bodies, the Remainder to the right Heirs of the Husband, he may devise that Remainder to his Wife.

If one devise all his Land in possession only, by such Devise there passeth those Lands only, and not those he hath in Reversion (3).

(3) Plow. 66.

A Devise of a Term by a man to his Wife for life, the Remainder over is not good (4).

(4) More, Case
1046.

One possess'd of a Term for 32 years, devised it to his Wife for her life, the Remainder to his Son *T.* and *E.* his Wife, if they have not Issue male: And in case they shall have Issue male, *then to be reserved and put out for the benefit and behoof of such Sons, or one of them*: In this Case it was held, That the Issue male should have the Term, and this Issue male need not to be born in the life of the Wife, but might be born after: That the Implication of the

The Devise was good to settle the Estate in the Issue male, and that the Wife of the Testator by the Devise to her for life, had an Estate during the Term, if she did live so long, and that the possibility of the Remainder of the Term to come, at his death was devisable by an Executory Devise (5). And yet if one devise a Term to his Wife for life, and that the Son shall have the residue of it that shall remain after his Wifes death, this Devise of the Remainder to the Son is void (6).

(5) Mo. Case. 1146.

(6) Anderf. 2.

13.

A Term of years was entailed by Devise to a Son, the Remainder to his Daughters, one Daughter was born after this Son; and it was held, That she should have a part, and that the Son could not destroy or prevent the Remainder by sale (7).

(7) Mo. Case.

358.

A Devise of a Term for years, being devised to one for life, the Remainder over to another; though such Remainder be a void Remainder, yet where a Lessee for years devised in this manner; viz. *I give my Lease to my Wife during her life, and after her death, that it shall go to her Children unpreferred*, and made his Wife his Executrix: In this Case, it was held good to a Daughter not preferred within it (8).

(8) Leon. 115.

3. 128. Co. 8.

96.

A. seised in Fee of a Messuage, devised the same to B. and after her decease to C. her Son, who was her Heir apparent, and died: B. took another Husband, and by him had Issue, and died. And if the Husband should be Tenant by the Courtesie? was the Question: It was adjudged in that Case, That the said B. was but Tenant for life, the Remainder to C. her Son for life, the Remainder in Fee-simple to the Wife, so as the Husband should not be Tenant by the Courtesie (9).

(9) Paſch. 19

Eliz. Dyer 357

Chick's Case.

Or if a man devise his Land to one for ever; and then further devise, that if the Devisee do such an Act, that another shall have the Lands to him and his Heirs, the same is void; for by devising his Land to one for ever, he devised the Fee; and when he hath disposed of the Estate in Fee to one, he hath not power after in the same Will, to dispose the same to another (10).

(10) Cro. 1.

par. 85. Cōr-

bets Case.

Lessee for 60 years of a Messuage and certain Lands, made his Will in this manner, *I Will that A. my Wife shall have and occupy all the Lands contained in the Lease for so many years, as she shall fortune to live: And after her decease, I give the residue of the years in the said Lease to B. my Son, and his Assigns*. He made his Wife his Executrix, and died, leaving Goods besides sufficient to pay all his Debts: The Wife proved the Will, entred into the Land, and claimed her Estate and Legacy in the Term for her life, the Remainder to B. according to the Will: Afterwards she took another Husband, and then she and her Husband, naming her self Executrix, aliened and granted all her Interest, Title and Term of years to come, and all their Estate therein, *Habend.* the Lands

and term until the full end of the 60 years; and, whether the same should bar the Remainder to *B.*? was the Question: In this Case it was resolved by all the Justices, That the Devise was good unto the Wife, and also to *B.* the Son in Remainder; and that
 (11) Pasch. 20. the entry of the Wife with her Claim of her Land a Legacy,
 Eliz. Plow. was a good Execution of both their Estates: And the Interest of
 Com. 516. the Wife was not any Collateral Occupation, but out of the
 Welcoten & same thing which was limited to the Son in Remainder; and the
 Elkindons Case Limitation to the Son was not a possibility (as it was objected)
 vid. Trin. 19. but a Devise of the Land it self (11).
 Eliz. Dyer: 56.
 357. acc.

CHAP. XIV.

Touching Devises of Lands with Limitations, and upon Condition.

1. *The Condition of a Devise of Land not written in the Testators life-time, makes the whole Devise as void, as if the Devise it self had not been written.*
2. *A Fee-simple of Remainder upon Condition by way of Devise.*
3. *In what Case the Executors of a substituted Devisee cannot claim the Lands devised under Limitations.*
4. *A Condition or Limitation may not continue a devised Estate for part, and defeat it for the residue.*
5. *In that Case the word [Paying] shall be construed only as a Limitation, and not as a Condition.*
6. *Not he in Remainder, but the Heir, shall take advantage of a Condition broken, annexed to a Devise of Lands.*
7. *A Condition or Proviso contrary to Law is a void Condition.*
8. *The Heir may enter upon a breach of Condition, notwithstanding a failure of somewhat that ought to have been done by a third person.*
9. *The Heir may not enter, where it is but a Limitation, and not a Condition.*
10. *If the Condition be, That a Lessee shall not demise the premises for above one year, and he devise the premises, it is a breach of the Condition.*
11. *Lands devised upon Condition of superstitious uses, are vested in the Crown.*

1: **I**F a man give order for the writing a Devise of his Land to *A. B.* upon Condition, and the Devise to him be accordingly written, but the Testator dieth before the writing of the Condition:

Condition: In this Case, the whole Devise to *A. B.* is void (*a*). (a) Brown. Rep. 1 par. 44.
 And as in the Case of Goods and Chattels conditionally bequeathed, the Executor shall keep the thing until the Condition be performed, and after the Condition broken shall take advantage thereof: So in Case of Lands conditionally devised to one and his Heirs for ever, or for life, the Heir of the Devisor shall keep the Land till the contingent Condition happen to take effect.

2. If one devise Land of the value of 100 *l. per annum* to *A.* for life, the Remainder to *B.* paying 50 *l.* to *C.* By this Devise *B.* shall have the Fee-simple of the Remainder upon Condition.

3. If one devise his Land to his Wife for her life, and if she live till his Son come to the age of 25 years, that then he shall have the Land, and if she die before he comes to that age, that then *A. B.* shall have it till his Son comes to that age. *A. B.* dies before the Wife, and after she dies before the Son comes to the age of 25 years: In this Case, the Executors of *A. B.* shall not have the Land till the Son comes to the age of 25 years (*b*).

(b) Goldsb. 64. Plow. 2.

4. *A.* seized of Lands in Fee, had Issue six Sons and one Daughter, and devised the said Land to *J. S.* for 90 years, if the said *J. S.* and *G.* his Wife, or any of them should so long live, the Remainder to *P.* his eldest Son, and the Heirs male of his body, the Remainder to these other Sons, the Remainder to his Daughter. Provided, that if the said *P.* his Son, or any of the Sons of the said Devisor, or any of the Heirs males of their body, should endeavour by any Act to Alien, Bargain, or Discontinue, then after such attempt or endeavour, and before any such Bargain, Sale, &c. were executed, that the Estate of such person attempting, &c. should cease, as if he were naturally dead; and that then the premises should descend, remain and come to such person to whom the same ought to come, remain and be, by the intent and meaning of his Will, and died. *P.* levied a Fine of the Lands, he in the next Remainder entred, and claimed the Reversion by force of the Devise. It was adjudged in this Case, That the Conusee had the Reversion in him, and might maintain an Action of Waste, because the Proviso of Restraint in the Will of *A.* was void and repugnant to Law; and a Proviso, Condition or Limitation, ought to defeat the whole Estate; and it cannot continue it for part, and defeat it for the residue (*c*).

(c) Hill. 37
 Eliz. in C. B.
 Rot. 1788.

5. A Copy-holder of Lands in Borough-English, having three Sons and one Daughter, deviseth his Lands to his eldest Son, paying to his Daughter, and every one of his other Sons Five pounds within two years, and surrendered to the use of his Will. The eldest Son was admitted, and did not pay the Five pounds within two years. In this Case it was resolved, 1. That al-

Jermyn & Arscots Case.

(d) 33 Eliz. in
B. R. Woollock
& Hammond's
Case. vid. Co.
6 part. Colly-
er's Case acc.

(e) Hill. 3.
Mar. Dyer
127. Warrens
Case.

(i) Dyer 33.
348. 216. 128.
vid. More, Case
162. 424. 361
495. 721. 614.
656. 1007.
790.

(f) Trin. 19
H. 8. Dyer 4.

though the yearly profits of the Lands for two year did exceed the money to be paid, yet the eldest Son had a Fee-simple. 2. Although this word [*Paying*] in the Case of a Will, makes a Condition; yet in this Case, the Law shall construe this unapt word [*Paying*] a Limitation. For if it should be a Condition, the same should descend to the eldest Son, and then it should be at his pleasure, whether the Daughter or Brothers should be paid or not; and therefore in this Case, the Law should judge the same a Limitation, of which the youngest Son should take advantage (d).

6. A man devised Landsto his Wife upon Condition that she should bring up his Son at School, &c. and that after the death of his Wife, the Land should remain to his second Son in Fee, and died. The Wife entred, the Condition was broken; the eldest Son, after his full age, entred for the Condition broken: In this Case it was held, 1. That a Condition might be annexed to a Will by the Statute of 32 H. 8. of Wills, which gives liberty to a man to devise for the advancement of his Wife, &c. (e)

2. That a particular Estate may be upon Condition, though the Remainder be without Condition. 3. That he in the Remainder should not take advantage of the Condition, but the Heir, because he is prejudiced in the Inheritance by the Devise. Therefore regularly upon the breach of a Condition, annexed to the Devise of Lands from the Heir to another, the Heir, and not a stranger, or he in remainder shall take the advantage of the breach of such a Condition. Hence it is, that if one devise his Lands to another, and his Heirs, provided that he paid 20 l. to A. B. otherwise that the Land shall remain to C. D. and his Heirs: In this Case if the Devisee do not pay the 20 l. to A. B. accordingly, C. D. may not take advantage thereof, nor have the Land according to the Devise of the Remainder: But the Heir of the Devisor may enter, and have the Land, and eject the Devisee (i).

7. If a man make two men his Executors, Proviso, that one of them shall not Administer his Goods, the Proviso is void, because it restrains the Authority which was given by the first part of the Will, and agrees not with the Law; for by the Law every Executor may Administer the Goods: And such was the opinion of *Baldwin* and *Egglesfield* (f). But *Fitzh.* conceived the Proviso to be good, for that he might bring an Action, although he did not Administer.

8. A man seised of Tenements in London, devised the same to two persons, upon Condition that they should pay to his Wife 10 l. *per annum* issuing out of the said Tenements, at two Feasts; and if the Rent be behind by the space of six weeks, being demanded, that it should be lawful for the Wife to distrain it.

It was held a Condition ; and that if the Rent be behind, yet the Wife cannot distrain before a demand of the Rent ; but the Heir of the Husband might enter for the Condition broken, though the Wife did not demand the Rent (g).

(g) Hil. 28. El.
Dyer 348.

A man devised his Land to his younger Son, when he should accomplish the age of 24 years, upon Condition that he should pay 20*l.* to the Daughter of the Devisor, and if he shall die before the age of 24 years, then his eldest Son shall have the Land, upon Condition that he pay the said 20*l.* and if both his Sons failed, that the Land should remain to his Daughter, and died. The younger Son entred after 24 years of age, and did not pay the 20*l.* to the Daughter ; the eldest Brother entred upon him. It was resolved by the Court in this Case, That the same was a Limitation, and not a Condition, and therefore the entry of the elder Brother was not lawful (h). So if a man devise to another under the age of 25 years certain Lands under this charge and condition, that he shall not alienate the same before he attain the said age of 25 years, and dies : And after the Devisee die before he attain to that age ; in this Case the Decision was, That the Land shall not go to the next Heir of the Devisor, but to the Heir of the Devisee, because it was not a Conditional Devise (i).

(h) Hil. 43. El.
in B. R. Wife-
man & Bald-
win's Case.
Goldsb. 152,
153.

(i) Charonda^{2d}
Resp. l. 7. c. 8.

10. A man made a Lease for years, upon Condition, That if the Lessee demise the premises, or any part of it, other than for one year, to any person or persons, then the Lessor and his Heirs to re-enter ; the Lessee afterwards devised it by his Will to his Son. It was held by the Court, That it was a breach of the Condition (i).

(i) 31 H. 8
Dyer 45. Hil.
36 Eliz. in B. R.
Cole & Tan-
tons Case
Goldsb. 184.

11. If Lands be devised upon Condition of superstitious Uses, as to find a Chaplain to say Mass, or the like superstitious Uses mentioned in the Will, the Remainder over for the like Uses, and if they in Remainder perform not the Condition, then to forfeit their Estate, and the Lands to remain to the right Heirs of the Devisor. In this Case it was held, That although the Land was devised but conditionally to find a Priest to say Mass, yet that it was within the Statute of 1 Edw. 6. cap. 13. where by the Lands were vested in the Crown, because the said Uses were superstitious Uses, to which the Condition of the devised Lands did refer (k).

(k) Hil. 45. El.
in C. B. Co. 1
part. Adams &
Lamberts Case.
Pasch. 17. Eliz.
Hubbard &
Spencers case.
C. B. Anderl.
case 126.

F. C. seized of the Mannor of S. made his Testament in writing, and devised the Mannor to his Wife for the Term of 30 years in these words ; viz. *For and to these intents and purposes following, viz. I will, and my mind and intent is, That B. my Wife shall yearly content and pay out of the issues and profits of the said Mannor to Sir A. J. and others 30 l.* And further will, That the other

other

other Legacies given in his Will should be paid by her, and therein devised divers Legacies. And further willed, That his Wife should be bound to Sir A. and others for the performance of his Will. *E. C.* the Devisor dies, the Wife enters on the Land, &c. takes the profits, and thereof pays the Legacies, but not to Sir A. and others, &c. Whereupon the Heir enters as for breach of Condition. It was held by the Justices, That it was no Condition, but a Declaration of the Testators intention; for to what end or purpose should the Wife be bound, if it were a Condition? But Judgment was not given in the Case, for the parties agreed.

If one devise his Land to his Son, on Condition, that he pay to his three Daughters 20 *l.* apiece at their full age, and dies: This was held to be a Condition, not a Limitation. But if such a Devise be made to the Heir, it shall be taken for a Limitation, not for a Condition: And the money must be demanded by the Daughters when they come of age (*l*).

(*l*) *Cro. 2. 56. 57: Curteys. v. Wolverston.* A. devised his Lands to his youngest Sons, *Proviso*, That if his Sons or any of their Issues demise any of the Lands before their age of 30 years, then the other shall have the Estate: The eldest Son made a Lease thereof before his age of 30 years, the youngest Son entred, and before the 30 years of age aliened the Land, the eldest Son entred: And it was held, That it was a Limitation. And that when the younger Brother had once entred for the Alienation, that then the Land was discharged of the Limitation (*m*).

(*m*) *Owen 8.*

If one devise his Land or his House to his Wife to dispose of at her pleasure: This is a Fee-simple. But if this be added, [*And to give it to one of my Sons, to which she pleases.*] Q. If this be not a Limitation thereof (*n*)? But if one devise his Land to A. B. to give and dispose to C. D. In this Case he may not dispose of it to any other (*o*).

(*n*) *Latch. 9. 39.*

Benloes 178.

(*o*) *Co. 1. 49.*

Kelw. 40. &c.

Latch. ubi sup.

One devised his Lands to his Wife to dispose and employ it on her self, and her Children, at her own will and pleasure. And it was held, That by this Devise she had a Fee-simple, but Conditional (*p*).

(*p*) *Mo. case 161*

(*q*) *Mo. Case*

806.

A Devise of Land upon Trust and Confidence to do such a thing, appointed in the Will to be done by an Executor or a Devisee, is not a Condition (*q*).

A Rent-charge in a Will devised by a Father to his youngest Son, towards his Education and bringing up in Learning, is not a Conditional Devise (*r*). But a Devise to the eldest Daughter of Land, and that she pay unto the younger Sister 20 *l.* yearly, is a Condition in a Will; and for non-payment, the younger may enter for breach of the Condition (*s*).

(*r*) *Leon. 3. 55.*

(*s*) *Cro. 3. 146.*

Land is devised to *A. B.* for life, on Condition, That he pay 100*l.* to *C. D.* and after to *C. D.* in Tail. In this Case, if *A. B.* do not pay the 100*l.* it seems the Heir may enter, and hold the Land during the life of *A. B.* and that *C. D.* may not have it till then (*t*). (*t*) Dyer 33.

A man devised divers Mannors to his Son in Tail, the Remainder 348, 123, 128. to *J. S.* and the Heirs males of his body, upon Condition, That he

or they, or any of them, should not alien, discontinue, &c. The Question was, Whether the meaning of the Devisor was to include his Son within the words of the Condition [*He or they,*] or only him in the Remainder? It was resolved, That no such Averment should be out of the Will; for a Will of Lands ought to be in writing: And the Construction of Wills, ought to be gathered out of the words of the Will, and not by any Averment (*u*).

(u) Mich. 34.
Eliz. in the
Court of Wards
Co. 5. par. 6.
the *L. Chey-*
ney's Case.

A. devised a House to *B.* his eldest Daughter, and her Heirs, and if she die having no Issue, then to *C.* his youngest Daughter and to her Heirs; and other Lands he devised to *C.* his Daughter and her Heirs, of greater value; and if she die within 16 years, that *B.* shall have her part to her and her Heirs; and if *B.* marry such a one, that *C.* shall have her part to her and her Heirs; and if *C.* die having no Issue, that all her part shall go to two other Nieces; and if *B.* die without Issue, that *C.* shall have her part to her and her Heirs, [*which in truth was said before.*] *C.* after 16 years died without Issue. It was adjudged in this Case, That *B.* should not have her part, but the Nieces; for notwithstanding the cross Limitation, it appears the intent was not, that *B.* should have by *C.* if she over-lives 16 years; and when the Testators intent is expressed, it shall not be taken by Implication (*w*).

(w) 16 Eliz.
Dyer 330.
Clutches Case.

A. seized of Lands in *B. C.* and *D.* having Issue *E.* his Son, and two Daughters, and his Brother having three Sons, *F. G.* and *H.* deviseth all his Land to *E.* his Son and his Heirs: And if he died without Issue, he devised his Lands in *B.* to *G.* his Nephew in Fee: *Item,* I devise my Lands in *D.* to *F.* my Nephew in Fee: And whether this were a good Devise to *F.* by way of Remainder, after the death of *E.* without Issue, or an immediate Devise to *F.* and a Countermand of the Devise to *E.* *quoad* those Lands, was the Doubt. It was resolved, That it was a Limitation by way of Remainder to *F.* and no Countermand: For the words shall be construed, That if *E.* died without Issue, then the Land should remain as the Devise was made to *G.* and the first by Limitation is to him, and the Heirs of his body, and no Fee: And so it was adjudged (*x*).

(x) Trin. 8. Jac.
Rot. 1180.
Brown & Jer-
vis Case. Cro.
2. par. 290.

C H A P. XV.

Touching Devises of Rents.

1. Rents issuing out of Lands, are as devisable as the Land it self, so as it be the Testators own Lands.
2. A Grantee may not devise the Rent, which he hath only for another mans life.
3. Rent to be issuing out of a Common, is not devisable.
4. Several ways how Rents may be devised.
5. The Devise of the Reversion of a Rent upon a false suggestion, is a void Devise.
6. Law Cases touching this Subject.

(a) Perk. Sect.
538. Lit. Sect
585. 586.
Dyer 253. 140.
Fitz. N.B. 121.
Co. sup. Lit. III.
8. 83. 3. 33.
Brownl. 1. par.
75. 76.

1. **A** Seigniori, Rent, or the like, is devisable as Land is, and will pass without the Attornment of the Tenant (a). So that a man may devise a Rent *de novo* issuing out of the Land, or a Rent issuing out of Land that is in *esse* before. And therefore if one make a Lease for life or years, rendring Rent, the Lessor may devise this Rent. Likewise if a Rent be granted to one and his Heirs, the Grantee may devise this Rent. Also a man that is seised of Land in Fee, may devise any Rent out of it at his pleasure. But a man cannot devise a Rent out of another mans Land that is none of his own, nor out of that which he hath not; and therefore if one devise Twenty pounds to be issuing out of his Mannor of *Dale*, when in Truth he hath no such Mannor, that Devise is void.

2. If Rent be granted to one man for the life of another, it seems the Grantee may not devise this Rent, but that on failure of other disposal thereof in the Grantees life-time, the Terre-tenant shall hold it as an Occupant (b). And if one devise a Rent of any certain sum out of his Land to be paid quarterly, and say not how long the Rent shall continue; this is but an Estate for life of that Rent (c).

(b) Dyer 253.
(c) Co. sup. Lit.
117. 8. 85.
Bro 2. part.
74. 75.

(d) Dyer in Str.
of Wills. Sect.
4. § 15.

3. If a man seised of a Common, granteth a Rent out of the Land, although that the Land be devisable, yet the Grant is void, and by consequence the Devise (d).

4. If a Tenant for life make a Lease for years, rendring Rent, and after the Tenant for life surrender to the Lessor all his right, and then the Lessor devise this Rent, this is a good Devise during the life of the Lessee for life. Or if a man make a Lease for life, reserving Rent to him and his Heirs, and the Lessor devise this Rent; this also is a good Devise of the Rent: otherwise it is, if

he

if he reserve the Rent to him and his Assigns. Or if a Lessee for Term of ten years, make a Lease over for Term of forty years, and the Lessor confirm the Estate, reserving a Rent to him and his Heirs, and after by his Will devise the Rent in Fee : This also is a good Devise of the Rent after the ten years, but but not before (e). Or if one devise the Rents which are mentioned in such a Writing, under Hand and Seal : This is a good Devise of the Rents, if there be such a Writing (1).

5. A man seised of a Rent, makes a Deed reciting, That whereas J. S. holdeth the said Rent of his Grant for Term of life, he grants the Reversion of the said Rent after the decease of J. S. to the Grantee and his Heirs in Fee ; and in truth, J. S. had nothing in the Rent : The Grantee deviseth this Rent, this is no good Devise of the Rent (f). If the Husband make a Lease for life to the Daughter and Heir apparent of his Wife, being Covert, rendring Rent, and the Wifes Mother die, and the Husband Devise the Rent. This is a void devise of that Rent (g).

6. In an Action of the Case upon *Trover*, the Defendant justified and pleaded Rent granted to A. his Executors and Assigns for the life of B. out of *Black-acre*, and shewed that A was dead, and that he as Administrator to A. distrained for the Rent on *Black-acre* in Arrears, after the death of A. and that he is to have it during the life of B. It was adjudged, That the justification was not good either for matter or manner ; for that after the death of A. the Rent determined, and cannot come to his Executors or Administrators ; for it was not a thing Testamentary, but a Frank-tenement, and nothing in the Grant to A. and his Heirs for the other's life.

If Rent be granted out of Land devisable by Custom, the Rent may be devised within the Custom, for it is of the same nature with the Land.

A. being seised of Land worth 25 *l. per annum*, deviseth 10 *l. per annum* to B. and his Heirs for ever, and 10 *l. per annum* to C. and his Heirs for ever : And then deviseth the Land to his Executors and their Heirs to help pay Debts : In this Case it was held, That the Devise of the Rents was good, and that the Land should go to the Executors, according to the Will (b).

A. seised of Lands, made a Lease for thirty years, the Lessee made a Lease for thirty years, rendring 30 *l. Rent per annum* ; and after he devised 28 *l. per annum* to three persons, *divisim*, *viz.* to each of them a full third part, which was 9 *l. 6 s. 8 d.* One of the Devisees brought Debt for his part against the Lessee : And it was held, That the Rent was Apportionable, and that the Tenant was chargeable without Attornment by the Devise to each of the Devisees for the third part of the Rent. (i).

(e) Dyer *ibid.*
Sect. 8. Sect.
29. 34. 37.
(1) Cro. 2. 145

(f) *Ibid.* Sect. 8.
(g) *Ibid.* Sect.
32. Mich. 44.
45 Eliz. B. R.
Salter's Case.
Yelv. Rep.

22 Aff. 3. Ad.
judged Perk. 3.
135. Roll. Abr.
tit. Devise E.

(h) Ley 62.

(i) More, Case
737 Ardres v.
Watkins. vid.
Co. 5. 67.

One having three Sons, *A. B.* and *C.* devised his Land after the death of his Wife to *B.* and if *C.* be living when *B.* comes to the Land, that then *B.* shall pay 10 *l.* yearly to *C.* [without any word, That *B.* and his Heirs should pay, or that they should pay it for the Land, or issuing out of the Land.] In this Case it was held, That if *B.* die, *C.* should have the 10 *l.* as a Rent out of his Land (*k*).

(*k*) Mo. case
1007. Andrews
versus Sheffield.

If one devise to *A. B.* That if he and the Heirs of his body be not paid 20 *l.* yearly, he and they shall distrain, &c. By this Devise *A. A.* hath an Estate-tail of this Rent. But if the Devise be, That if *A. B.* be not paid 20 *l.* yearly, he shall distrain, &c. By this *A. B.* hath only an Estate for life in the Rent. Likewise, if one devise a Rent of 20 *l.* out of his Land to be paid quarterly, and say not how long the Rent shall continue: This shall be a Devise of that Rent but for life (*l*).

(*l*) Co. on Lit.
147. 885.

Brownl. 2 74.
More case 803.

(*m*) Dyer 348

If a Testator devise a Rent out of his Land, and charge his Land by Will with a Clause of Distress therein for it: In that Case, the Devisee upon failure of the payment thereof, may distrain, otherwise not (*m*).

C H A P. XVI.

Of Devises touching the sale of Land by Executors or others.

1. *The mean profits of Lands devised to be sold, are not Assets in the Executors hands, unless the Testator shall specially so appoint it.*
2. *The Heir, and not a stranger, though appointed in the Devise, shall take the advantage of a breach of Condition annexed to a Devise touching the sale of Lands.*
3. *Where the Executors have only an Authority, and not an Interest in the Lands devised to be sold, the Heir of the Devisor shall have the mean profits thereof till it be sold.*
4. *Otherwise, where the Executors have an Interest; in which case, the Money or proceed upon the sale, but not the mean profits shall be Assets in their hand.*
5. *Several Devises touching sales of Land, with or without the assent of another.*
6. *By the word [Appurtenances] shall pass in a Devise, Lands commonly used with a Messuage.*
7. *A Copy-holders Case of Devise of Land to his Wife.*
8. *Where one, who hath but an Estate for life, and no interest to sell, may yet have an Authority to appoint who shall sell the Lands devised.*
9. *In what Case, relating to this matter, a Prohibition may lie, or not.*
10. *A Case of Law, wherein one Executor alone (where there are two) cannot sell the Land devised.*
11. *How a sale of Lands devised to be sold, may be void for want of sufficient Authority.*
12. *In what Case a sale of Lands devised to be sold, may be made by one Executor, where there are two appointed by name.*
13. *Where there is an Interest as well as an Authority and Trust, the Executor of the surviving Executor may sell the Lands of the first Testator devised to be sold.*
14. *Executors who refuse to Administer the Goods, may yet sell the Testators Lands devised to be sold.*
15. *Lands devised to be sold by Executors, the one refusing, the other may sell, but not to the Refuser.*
16. *A sale only by some of the Executors is void, where there is a special and joynt-trust.*
17. *The difference between an Authority, and an interest in Executors in point of Sale.*

1. **I**N all Cases of Devises of Land to Executors to sell the same, it is most prudential to make it as clear and certain as may

be; (that is,) That the Executors or the Survivor of them, or such or so many of them as take upon them the Probate of the Will (if his intent be so) shall sell it (a). And it is safer to give only an Authority than an Estate, unless his meaning be, that they shall take the profits of the Land until the sale : And if he do so, then it is requisite that he appoint the mean profits until the sale shall be Assets in their hands; for otherwise it shall not be so (b).

(a) Co. sup. Lit. 112, 113.
(b) Brownl. 1. 34. 2. 47. 100. Vid. More, case 29 E. 463. 470 1069. Anderf. 1. 27. 145. 2. 59. Jenk. Cent. 44. 184. 239. 244. Bulstr. 2. 123. Cro. 3. 335. 382. 525. Ascough's Case in the Court of Wards.

2. If one devise Lands to others, to the intent that with the profits thereof they shall educate Children, or pay such sums of money, or the like : In this Case, the Devisees must do accordingly, or they may be compelled thereunto (c). And regularly the Heir, and not a stranger, shall take the advantage of a breach of a Condition annexed to Devises touching sale of Lands. And therefore if one devise Lands to another and his Heirs, provided that he pay 100*l.* to A. B. otherwise, that the Land shall remain to C. D. and his Heirs : In this Case, if the Devisee do not pay the money, C. D. shall not take advantage of it, nor have the Land according to the Devise, but the Heir of the Devisor shall enter, and have it, and eject the Devisee (d).

(d) Dyer 33. 348. 126, 128.

3. If the Testator intending to have his Land, or part thereof sold, for the payment of Debts or Legacies, doth devise the same in this manner; *viz.* I will that my Executors, or that A. B. and C. my Executors shall sell my Land (e). In this Case, the Executors have only an Authority, and no Interest; for which reason, the Land in the mean time descends to the Heir of the Devisor, who shall enjoy the profits thereof until it be sold : In which Case also, the Executors may sell it when they please, unless they be hastned thereto by Order of Court; and are all to joyn in the sale : Inasmuch, that if one or more of them die before the sale, the surviving Executors, or the Executors of the deceased Executors may not sell it by this Authority. The Case is the same if any of the Executors refuse the charge of the Will : In which Case, the rest of the Executors which accept the said charge, may not alone sell the Land, unless the words in the Will be, That his Executors, or some of them, shall sell it : But now by the Statute of 21 H. 8. cap. 4. some of them may sell it without the rest, in case any of the Executors die before the sale.

(e) Co. sup. Lit. 236. 112, 113. 15 H. 7. 12. Dyer 177. 219. Kelw. 40. 45. 31. 107. 108. Perk §. 342. 543. Lit. Bro. §. 371. Vid. sup. in part. 2. cap. 27.

4. But if the Testator devise the Land in this manner; *viz.* I give my Land to my Executors to be sold, &c. In this Case, the Executors have as well an Interest in the Land, as an Authority to sell it : And therefore it doth not here descend unto the Heir.

Heir, as in the former Case, but the Executors shall keep it till the sale, and may sell it when they will; so as it be within any competent or convenient time; for otherwise the Heir may enter and eject them, by a Condition in Law annexed to the interest. And in this Case, mean Profits until the Sale is no Assets; but the Money or proceed upon the Sale shall be Assets in their hands. And in this Case, and if before the Sale one or more of the Executors die or refuse, the rest may sell it, for the Estate surviveth: But it is supposed they may not sell to him that doth refuse the charge of the Will; neither may they in either of these Cases transfer their power of selling to any other, nor keep the Land themselves, though they pay the value thereof with their own Money.

5. If the Devise be, that the Executors shall sell with the Assent of *A. B.* In this Case, if *A. B.* die before he Assent, the Executors cannot sell; and in his life-time they cannot sell, without his Assent (*f*). And if one deviseth that his Lands shall be sold to (*f*) Brownl. &c. pay his Debts, and say not by whom, in this case it shall be sold by Rep. 100. Executors: Or if one devise all his Land, except ten acres, which he doth appoint to pay his Debts; by this Devise, his Executors, or the Survivor of them, may sell the said ten acres. But if one say by his Will, That *A. B.* shall have as well the Guardianship and Education of his Children, as the disposing, letting and setting of his Lands: In this Case *A. B.* hath not power to sell the Land (*g*). Or if one devise, that his Land shall be sold after his (*g*) Pesk. §. 547 Wifes death by his Executors, with the Assent of *A. B.* and make Dyer 371. 264. his Wife and another his Executors, and die, and after *A. B.* die: In this Case, the Land cannot be sold, for the Authority is determined (*b*). (h) Dyer 219.

6. Suppose a man seised in Fee of a Messuage, with which certain Lands have been occupied time out of mind, give his Instructions for the making of his Will; & *inter alia* declares, That his meaning is, that his said Messuage, and all his Lands in *W.* shall be sold by his Executors; and the party that writes his Will, pens it in this manner; *viz. I will that my House with all the Appurtenances, shall be sold by my Executors*; the Devisor (*i*) Hill. 28. dies, the Executors sell part of the Lands: By this Devise, such Eliz. B. R. Sale is good, and the Lands do pass; for the words, [*with all the Appurtenances,*] are effectual to enforce the Devise, and extend to all the Lands; specially, because the Devisor gave Instructions accordingly (*i*). Highman and Harewood's case Leon. Rep. 34. vid. 3 El. Plow. Com. 210. Sanders & Freeman's case.

7. A Copy-holder deviseth his Land to his Wife for her life, and that after his death, the Wife or her Executors should sell the Land, and surrendered to the use of his Will; which was entred thus, *viz. To the use of his Wife for life, secundum formam ultimæ voluntatis*: In this Case, she hath an Estate in the Land to her

own use for her life, and also an Estate in Fee to sell it; otherwise the clause (*Secundum formam ultimæ voluntatis*) should be void (*k*).

(k) Mich. 29
Eliz. E. R.
Godsb. 46.

8. A man deviseth by his Will his Lands to his Wife, and if she have Issue by the Devisor, that his Issue shall have it at his age of 21 years, and if the Issue die before that age, or before his Wife, or if she have no Issue, that then she shall choose two Attorneys, and she to make a Bill of Sale of any Lands to her best advantage. In this Case, she hath those Lands for life, and she having no Issue, hath not any interest to dispose, but hath an

Authority to nominate two, who shall dispose of the Lands, and they make sale thereof (*l*).

(l) Mich. 5 Jac.
B. K. Beale &
Shepherd's case
Ofo. 2. p. 199.

9. A man did devise his Lands which were held in Socage, to be sold by his Executors, and that the money thereof coming should be disposed of in payment of special Legacies which he appointed by his said Will; the Executors sold the Lands. One of the Legatees (after the Will was proved) sued the Executors in the Ecclesiastical Court for his Legacy; whereupon a Prohibition was prayed: It was resolved in that Case, 1. That the money was Assets in the Executors hands. 2. That there was no remedy for it but by Suit in the Ecclesiastical Court, and

(m) Trin. 9
Eliz. Dyer 264

therefore a Prohibition did not lie in the Case (*m*). But Query of the second payment; for it was held by all the Justices of both

(n) Mich. 4, &
5 Mary. Dyer.
152.

Benches (*n*), Where a man deviseth that his Executors shall sell Lands, and of the money coming shall give such a Portion to his Daughter, that this was not a Legacy, because going out of Lands, and that Suit did not lie for it in the Ecclesiastical Court: But an Accompt lies at Law for the money, and therefore in that Case a Prohibition was granted to stay the Suit in the Ecclesiastical Court (*o*).

(o) Dyer 151,
252.

And in another Case it was held, That a Prohibition will lie upon a suggestion of a Testators being *non sana Memoria*: As in Sir John Egerton's Case, who by his Will devised all his Lands and Goods to a stranger, and gave nothing to his Heir or Daughters; whereupon *Yelvert*. suggested, that he was not *de bon Memory*, in that he made such a Will, and thereupon prayed to have a Prohibition to stay the Probate of the Will for the Lands and Goods both, according to *Co. 6. Marq. Winch. 23*. He shewed also, that the Daughters had sued out an Administration. *Haught*. There was one *Collet's* Case in this Court, wherein I was of Council, wherein a Prohibition in the like Case was granted of the whole. *Dod*. The Probate of a Will in the Spiritual Court lies not in this Court, nor in the Spiritual Court it self, if a meer stranger prove it only in common Form, *Quod fuit concessum per Coke*. An Executor cannot maintain any Action of Debt, before he hath proved the Will: And so the Court seemed to incline. That

That a Prohibition ought not to be granted (as to the Goods;) and the day before it was so held expressly, for the reason aforesaid, and said, That it had been also resolved. *Coke*, the Case of the Marq. *Winchester* was resolved upon my Motion: And as to the mischief or prejudice, That an Executor cannot have his Action before Probate, that is not in our Case; for here the Administrators may have their Action against the Executor, and then the Issue will be, Whether Will or no Will? And it was ordered, that a Prohibition should be granted. (1).

(1) Pasch. 12.
Jac. B. R. Sir
John Egerton's
Case Rol. Rep.

10. A devise was made to *A. B.* for life, the Remainder to *C. D.* in Tail, and if *C. D.* die without Issue of his body, that then the Land shall be sold by his Executors, he maketh two Executors, and dieth *A. B.* dieth *C. D.* dieth without Issue of his body: In this Case it seemeth, that one of these Executors alone cannot sell the Lands. (p).

(p) Goldsb. 2.
Plow. 4.

11. A man devised his Lands to his Wife for term of her life, the Remainder to *D.* his Daughter in tail, and if she died without issue, that then after the death of his Wife, the Lands should be sold for the best value by his Executors with the assent of *A.* and *B.* and made his Wife and a Stranger his Executors, and died: The Wife entred and died; *A.* and *B.* died, and the Executor who survived sold the Land alone: The Opinion of the Court was, That the Sale was not good, because he wanted sufficient Authority, (q) or his Authority was determined.

(q) Mich. 30.
El. Dyer 219.

12. A man seized of divers Mannors and Lands, devised all the said Mannors and Lands to his Sister and her Heirs for ever, *Except out of this General Grant my Mannor of R. which I do appoint to pay my Debts*; and made two Executors by name, and died. One of the Executors died, the other took upon him the charge and execution of the Will: and afterward sold the Mannor of *R.* for 300*l.* for the purpose aforesaid in Fee. It was the Opinion of the Court, that he might well sell it; for by the Circumstances it appeareth, That such was the Testators intent; and not to leave the Reversion to descend to his Heir, but to trust his Executors with the Sale of it, for the payment of his Debts (r).

(r) Mich. 23
El. Dyer 312.

13. *A.* made *B.* and *C.* his Executors, and by his Will appointed, that they should have and hold the Issues and Profits of his Lands: until his Heir should come to the age of 21 years, to the intent that the Executors with the profits thereof, should pay his Debts and Legacies, and bring up his Children. One of the Executors died, the surviving Executor made his Executor, and died also, the Heir being within age. It was the Opinion of the Court in this Case, That the Executor of the Survivor might receive the profits of the Lands, and dispose of them during the

non-age

non-age of the Heir, because it was an interest in the Executors, and not an Authority or a Trust only (s).
 (s) Hill. 2 El. Dyer 210.

14. If a man hath Feoffees, and makes his Will, That his Executors shall alien his Land; if the Executors refuse the Administration of their Goods, yet they may sell the Lands, because the Will is not of a thing Testamentary: But the Executors have not a power to meddle with the Land, unless such a special power be given to them. If a man make his Will of his Lands, and that his Executors (without naming them by their proper names) shall sell them, if they refuse to be Executors, yet they may sell the Land: But if a man makes his Will, That his Lands which his Feoffees have, shall be sold, and doth not say by whom, the Executors shall sell the same, and not his Feoffees, because the moneys which come by the Sale, shall be Assets in the hands of the Executors; which is a proof that they may sell them: And if his Will be, That the Executors shall sell the Lands before the Alienation, the Heir may take and receive the profits thereof; and if no Sale be made, the Heir shall hold the Land for ever (t).

(t) Mich. 15. H. 7. 12.

15. A man deviseth, That his Executors shall sell his Lands: Now by the Statute of 21 H. 8. cap. 4. if the one refuseth, the other may sell the Lands; but the Sale cannot be made to him who refuseth (u).

(u) 27 Eliz. in Benloe's case adjudged. vid. Co. 1. d. Infit. 113.

16. A man made his Will, and made A. B. C. D. his Executors, and devised his Lands to the said A. B. C. D. by their special names, and to their Heirs; and further devised, That the Devisees should sell the Lands to F. G. if he would give for it before such a day 100 l. and if he would not, that then they should sell it to any other, to the performance of his Will, viz. the payment of his Debts. F. G. would not give the 100 l. one of the Executors refused to intermeddle, the other three sold the Land: It was the Opinion of the Court, That the same being a special and a joynt-trust, that it could not survive, and that the Sale by the Heir was void (w).

(w) Mich. 29. El. B. R. Bonifant & Sir Rich. Greenfield's Case. Godbolt. 77. vid. 26. Eliz. B. R. Vincent and Lee. Case. Co. 1. part. Infit. 113. acc. These and other cases relating to this Subject, are reported in Hugh Abridgement. Tit. Devise.

27. By the premises it is evident, that if a man willeth that his Executors shall sell his Lands for the payment of his Debts, and all they die but one, and the Survivor make the Sale, the Vendee shall not have the Land, and that the Law is otherwise, if the Lands were devised to the Executors to be sold: The reason is as aforesaid, because in the former Case the Executors have only an Authority; in the other Case they have an Interest. But if a man maketh two Executors, and willeth, that they shall sell the Land for the payment of his Debts, and they sell it only for Term of life, the Remainder to one of themselves, and the Vendee dieth, he in the Remainder may enter. (x) See Q.

(x) Dyer in St. Wills. Sec. 3. Sec. 10. 11.

In the Kings-Bench a Prohibition was prayed to the Spiritual Courts to stay a Probate of a Will, wherein personal Goods and Free-hold of Lands are devised, upon this Suggestion, That the Devisor was not *compos mentis*, at the time of the Devise made. *Dod.* It doth not seem reasonable to stay the Probate of the Will for the personal Goods, wherewith we have nothing to do, for that would be very mischievous; for if the Probate should be staid, the Executor could not have any remedy for them. *Coke*, It hath been formerly granted, as in the Marquess of *Winchester's* Case. Co. 6. 23. *Dod.* But it hath been divers times ruled otherwise. *Coke*, It was so ruled in *Egerton's* Case, Rep. 12 Jac. 7. 6. *Quod fuit concessum per* Haught. *Coke*, A Prohibition shall be granted as to the Free-hold, *Quod fuit concessum per* *Dod.* And a Prohibition was granted accordingly: And it seems the Prohibition was so granted by the Opinion of *Dod.* (y). But in another Case, where an Administrator is sued to Accompt, there and in such Cases a Prohibition hath been denied. For the Administration of the Goods of a Daughter, being granted to the next of Kin, viz. the Mother, the Administratrix being afterwards sued in the Spiritual Court to Accompt, and that the money which remained might be distributed amongst twelve others next of Blood to the Intestate: And hereupon a Prohibition was prayed *per Crook*, for that the intent of the Statute is, that the next of Blood should solely have the benefit of the Goods which remain. But the Prohibition was denied by *Dod.* and *Haught.* for that it is common and frequent in the Law Books, that an Administrator may be compell'd to Accompt (z). But if after a Prohibition there be a Consultation granted, there shall not be another Prohibition, after the granting of such Consultation (a).

If a Testator doth Will, That his Executors shall sell his Land, or doth Devise it to his Executors to be sold, and one of them refuse before the Ordinary to Administer, the other Executor cannot sell the Land to him who so refuseth (b): Nor to any other, as it hath been held: For one devised his Land to his two Executors to sell, and one of them refused before the Ordinary, and it was held, that the other could not sell (c).

If Land be devised to be sold by two Executors, whereof one of them dies before the Sale; in that Case, the surviving Executor may not sell the Land. It may be otherwise, in a Case where there are three or more Executors: And therefore if a Testator doth devise, that his Sons shall sell his Lands, leaving four Sons, whereof one dies, the three surviving may sell the Land (d). But where the Devise is special to Executors, and they especially named to sell the Lands, there is no power or authority to sell in the Survivors of them, for the Sale in that Case must be by the male (e).

(y) Pasch. 14.
Jac. B. R. Rol
Rep. Case 9.

(z) Pasch. 14
Jac. B. R. Shar
vers. Simpson.
Rol. Rep.

(a) Pasch. 14.
Jac. B. R. Rol.
Rep. Case 33.

(b) Stat. 21 H
8. C. 4. Ander
1. 24.

(c) Benloe's
14. Leon.

(d) Anderf.
145, 146.

(e) Co. Inst. 1.

A Testator devised his Land to his Wife for her life ; and after in his Will orders the said Land to be sold by his Executors under-named, and after nominates two Executors, whereof one after died : In this Case it was held, That these Executors had but a bare Authority to sell the Land after the Wifes death, and no Interest in the same. It was doubted, Whether they might sell before the Wifes death? But agreed, That in this Case the surviving Executor might sell (f).

(f) Cro. 382.
Howel vers.
Barnes.

If a Devise be made by a Testator, That his Sons in Law shall sell his Land, and after one of them die before any sale made, the Survivors, being two, may sell it (g).

(g) Mo. case 291

A man levied a Fine to the use of himself for his life, the Remainder to his Executors, until they have levied 300 l. for performance of his Will, and dies : The Executors suffer a stranger to enter, who received of the profits of the Land more than was only sufficient to pay the 300 l. After this the Executors entred, and made a Lease for years ; and it was held, That the Estate of the Executors was ended by their own negligence, and that the words of the Will, [*they shall have levied,*] shall be taken for, [*until they might have conveniently levied* (h).]

(h) Mo. case.
721.

A man devised his Lands to his eldest Son in Tail, the Remainder to his youngest Son in Tail, the Remainder to his Daughter in Tail : And if they all died without Issue, that then the Land should be sold by Executors. The eldest entred, and died without Issue ; the younger Son entred, and suffered a *Common Recovery*, and after died also without Issue ; then the Daughter died also without Issue : And it was resolved, That the Executors could not now sell the Lands (i).

(i) Mo. case 192.

Land was devised by Husband to Wife for her life, the Remainder to another for his life : And the Testator devised, That after their deaths, the same Lands should be sold by his Executors, or the Executors of his Executors : The Wife died before the Husband and the Testator, he in the Reversion died, and during their lives, one of the Executors also died Intestate : In this Case it was the Opinion of the Justices, That the Executors of one Executor should not make the Sale, because they had no Interest, but only an Authority, and that Authority jointly ; and therefore if one of them fail, the other cannot execute the Testament : And so it was said to be adjudged in *Franklyn's Case*, where a man devised, That *A. B.* and *C. D.* by the advice of the Parson of *G.* should sell his Lands after his death ; and before the Sale the Parson died, and the other two could not sell the Lands (k).

(k) Mo. case.
164.

Devise, That Executors shall sell Lands, and with the money, the Proceed of such Sale, pay such and such Legacies, or sums of money in particular, to such and such persons by name, are not such

such Legacies as for which Suits may be commenced in the Ecclesiastical Court : But for this, every one that is to have a part therein, may have an Accompt for the same against the Executors after the Sale (l).

The Case was, one having 6*l.* Land *per annum* in possession, and other Land in Reversion, upon an Estate for life, by his Will devised all his Lands to his Executors for ten years, to pay his Debts, and perform his Will : And that after the ten years expired, his Executors, or one of them, or the Executors Executors, or any of them, should sell his Lands : He made divers Executors, gave 40*l.* Legacies by his Will, and died. After the ten years, two of the Executors sold the Land : In this Case it was held, 1. That the Land in Reversion might be sold, as well as the Land in Possession. 2. That the Sale made by two of the Executors was good. 3. It was agreed that the Devise, That his Executors might sell, was a good Devise within the Statute of Wills (m). (l) Dyer 151. Bulltr. 1. 193. (m) Mo. case 441.

Lands in Possession and Reversion upon a life, are devised to three Executors, to sell to pay Debts : One of the Executors dies, the Tenant for life dies : In this Case it was held, That the Sale of the whole by the surviving Executors was good (n). (n) Cro. 1. 524. Townsend ver. Wade.

Before the Statute of 27 H. 8. *Cestuy que use*, by his Will devised, That A. B. and C. his Feoffees, should suffer his Wife to take the profits of his Lands during her life ; and that after her decease, the premises should be sold by the said Feoffees, and that the moneys thereof received, they should pay to certain persons. The Testator died, A. one of the Feoffees died. The Opinion of the Court was, That the Survivors could not sell the Land : But they doubted of it, in case they had not been specially named (o). (o) Hill. 2 Elr Dyer. 177.

C H A P. XVII.

Of Legacies and Devises in respect of Marriage, as also between Husband and Wife.

1. *A Condition of Marriage may be annexed to a Legacy; but an unlawful Condition thereof is void, and doth not prejudice the same.*
 2. *A Condition of Marriage, with the consent of a third person, doth oblige the Legatary to marry, if he will have the Legacy; but doth not oblige him to have such consent.*
 3. *A Condition of Marriage, with the advice of another, obliges the Legatary to ask such advice, if he will have the Legacy, but doth not oblige him to follow it.*
 4. *If a Legatary be married when a Legacy is given him on Condition of Marriage, it is material to see whether the Testator knew so much, or not.*
 5. *A Condition against Marriage is void, and the Legacy will be good notwithstanding.*
 6. *If there be given to one, if he shall not marry, a Legacy when he dies; he shall have it presently, and not wait for it till his death.*
 7. *If 200 l. be given to one if she do not marry, and 100 l. if she doth, and she after marryeth; What shall the Legatary have?*
 8. *What the Wife shall have (as to her Legacy) if she marry after her Election to the contrary.*
 9. *The distinction which the Canon Law makes, in case of Conditions directly contrary to Marriage.*
 10. *If the Husband doth devise his House to his Wife quamdiu she shall continue a Widow, and she live and die such, it shall accrew by the Civil Law to her and her Heirs for ever.*
 11. *A Legacy on a Marriage Condition, or made payable at a time to come, and the Legatary die before the time come, whether and when due.*
 12. *Difference between bequeathing a Legacy to one when he shall be of full age, and bequeathing it to him to be paid when he is of full age.*
 13. *A Devise made by a Feme sole to him with whom she after marries, is void.*
 14. *A Devise of Lands generally made by the Husband to the Wife for life, is no bar to her Joynture; otherwise, if devised for her Joynture.*
 15. *A moiety of Goods devised by the Husband to the Wife, is the moiety of them as they were at his death, if there be Assets enough for his Debts.*
1. **I**F a man bequeath 100 l. to A. B. provided that he marry with C. D. the Marriage must take effect with C. D. before

before the Legacy is due to *A. B.* unless there be an Illegality or too much indignity in such Marriage : In which Case the Condition is void in Law, and it shall not prejudice the Legatary. (a)

2. If I bequeath 20*l.* to *E. F.* so as she marry with the good liking and consent of *A. B.* she must marry, otherwise she hath no right to the 20*l.* (p) But she is not obliged to have the consent of *A. B.* therein. (c) Yea, she shall have the Legacy, though she marry not only without his consent, but also although *A. B.* be altogether unacquainted therewith, or knowing thereof, should contradict it, (d) unless it be appointed in the Will expressly, That in case she marry without such consent, the said Legacy of 20*l.* shall be and enure to such or such pious Uses specially mentioned in the said Will. (e)

3. If I bequeath 100*l.* to *A. B.* so as she marry with the Advice of *C. D.* In this Case *A. B.* shall not have the said Legacy, unless she require or desire the Advice of *C. D.* Albeit, she be not obliged to follow his Advice therein, yet she is obliged to ask his Advice; or she cannot have the said Legacy. The reason of the difference in this Case from the former is, That in the former there may be a total impediment to Marriage it self; in this it is otherwise. (f) But if *C. D.* be dead, whereby the Condition is rendred impossible : In such Case it is as if it were performed, provided that *C. D.* were dead before his Advice could well be ask'd or required.

4. If a man bequeath 100*l.* to *C. D.* in this manner ; viz. *I give and bequeath 100*l.* to C. D. if he shall marry.* And *C. D.* was a married man at that time when the Testament was made. In this Case it is resolved, That if *A. B.* the Testator were at the time of the making the Testament ignorant of *C. D.*'s being then married, the Legacy is instantly due to him upon the Testators death, because the Condition in a legal Construction, is actually performed : But if the Testator at the time of his making the Testament, did infallibly know that *C. D.* was then married, the said Legacy is not due to him until he be married a Second time : (g) Which Distinction ought to fall under Consideration with those who hold, That if a Testator bequeath 100*l.* to *C. D.* towards her Marriage, the Legacy may be due to her, albeit she were married at that time when the Testament was made. (h)

5. If I bequeath 10*l.* to one provided she doth not marry, it is a void Proviso in Law, and she shall have the 10*l.* although she do marry. (i) Otherwise it is, if the words be, Provided she do not marry at such a time, or in such a place, or with such a person. (k)

6. If a man Devise to *A. B.* in this manner ; *I give unto A. B. if she shall not marry, my Manner if D. when she dies :* In this

(a) Mant. de Conject. ult. vol. lib. 11. tit. 18. & l. Titio centum. §. 1. de Demonst. & Condit. & l. hæc. Conditio, de Demon. & Condit.
(b) Mant. ibi.
(c) L. 27. §. Si arbitratu. ff. De Demon. & Condit.
(d) Vasqu. Con- trovers. l. 3. c. 94. nu. 14.
(e) Mant. ubi Supra.

(f) Mant. ibid. nu. 10. & Grassus §. Legatum. q. 50. nu. 11.

(g) Si jam facta ff. de Cond. & Demon. & Pa- po. Notar. t.

l. 9. tit. de Fi- dei comis.

(h) Bald. ad L. ult. C. De Sen- tent. quæ, &c.

(i) Mant. l. 11. tit. 19. in l. hoc modo, de Cond. & Dem.

(k) Pèrègr. de Fidei comis.

art. 11. nu.

118.

this Case *A. B.* although she marry, shall have the Mannor presently, and not expect or wait for it until her death. The reason is, because that the time of her death is not joyned with the Legacy, but with the Condition; as if the Testator had said; viz. If *A. B.* shall remain unmarried to her death. (l).

(l) Cuiac. in l.
in testato §. Sed
fi. De suis &
Legit.

7. Suppose a man doth bequeath 200 *l.* to *A. B.* if she do not marry, and 100 *l.* if she do marry; and after she marrieth. Some are of opinion, that in this Case *A. B.* shall have 300 *l.* viz. 100 *l.* because she is married, and 200 *l.* because the Condition of non-Marriage, or against Marriage, is void. Others are of opinion, that she can recover but one of the said Legacies, and that is the 200 *l.* (m).

(m) L. Titia. ff.
De Cond. &
Demonst.

8. Suppose a man bequeath to his Wife the use and occupation of all his Goods, if after his decease she shall abide in her Widowhood: But in case she marry again, that then she shall have only 100 *l.* In this Case, if at first the Wives Election be to continue in her Widow-hood, she shall accordingly enjoy and have the use and occupation of the said Goods: But if after that she marry, she shall not have the said 100 *l.* (n) And some are of opinion, That by such second Marriage, she forfeits both the said Legacies, because thereby she nulls her precedent Election whereby she was concluded, and therefore shall also restore or refund the value of the Interest of such Goods as she used and enjoyed during her Widow-hood; and so it hath been adjudged (o).

(n) Surdus de
Alimentis. tit.
9. quæst. 16.
vers. Addo.

(o) In Rot. Rot.
dicit Matheac.
de Legat. in
lib. 1. cap. 4.
nu. 17.

9. Although a Condition directly contrary to Marriage, annexed to a Legacy in a Will, is a void Condition for that very reason, yet the Civil, or rather the Cannon Law, doth distinguish in this point between a Virgin and a Widow, and says, that such Conditions against Marriage (as to a Virgin) are void; but allows them as to Widows. (p) Specially, if the Legacy be given by a Husband to his own Wife, or by a Son to his Mother.

(p) Mant. lib.
21. tit. 19. &
Ranch. Decif.
part. 1. Concl.
298. cum mul-
tis aliis.

(q) De prætis.
lib. 4. int. 1.
dub. 10. nu. 93.

10. A man bequeaths the House wherein he lives to *A. B.* his Wife *quamdum* she shall continue a Widow, and dies: *A. B.* doth not re-marry, but lives and dies a Widow: In this Case, the said House by the Civil Law comes to *A. B.* and her Heirs for ever. (q) Note, That what in the premises hath been said touching the invalidity of Conditions against Marriage, annexed to Legacies in relation to Females, holds the same in Law touching the like illegal Conditions in reference to Males or Malescullines.

11. A man devised to his Daughter 500 *l.* towards her Marriage. In this Case it was the Opinion of the Court, That if she die before Marriage, her Executors shall have it: But if the words were, [To be paid at the day of her Marriage, or at the age

age of One and twenty years,] and she dieth before both, it is otherwise (r). The latter part of which Judgment seems not to agree with the Civil Law in that point; which says, the time of the age of a Legatary, may be joyned either to the substance of the Legacy, or to the execution and performance of the same, If the time of the age of the Legatary be joyned to the substance of the Legacy, as, *when the Testator doth give thee 100 l. when thou shalt be of the age of 21 years*: In this Case, if thou diest before that time, thy Executors cannot recover the 100 l. But if the time of the age of the Legatary be joyned only to the execution or performance of the Legacy, as, *when the Testator doth give the 100 l. which he willerb, shall be paid when thou accomplish the age of 21 years*: In this Case, although thou die before thou accomplish the age of 21 years, yet the Executors or Administrators shall recover the same, when the time is accomplished, wherein thy self (if thou hadst been then living) mightst have recovered the same.

12. Consonant whereunto is that which we find reported, viz. That it was agreed by the Court, That if a man deviseth to his Daughter 100 l. when she shall be married, or to his Son when he shall be of full age, and they die before the time appointed, and make Executors, their Executors shall not have it. But it is otherwise, if the Devise were to them, to be paid at their full ages, and they die before that time, and make Executors, there the Executors shall have it (s). Which difference was since likewise to agreed and adjudged (r).

13. A Feme Sole, deviseth Lands to A. B. in Fee, to whom afterwards she was married; and during the Coverture countermands her Will, saying, Her Husband should not have the Land, nor any other benefit by her Will, and dies: In this Case, the Husband shall not have the Land; not only because of her countermand, but because of the disability of a Feme Covert to make a Will, which takes no effect till the parties death (u). And therefore if a Feme Sole deviseth Lands to a man, and then takes him to Husband, and dies: This inter-Marriage is a Reversion of the Devise, and the Heir of the Woman shall have the Lands, and not the Husband; because after Marriage the Will of the Wife, in judgment of Law, is subject to the Will of her Husband, and a Feme Covert hath not any Will; for the making of the Will is but the Inception thereof, and takes no effect till the death of the Devisor (w).

14. If a man deviseth Lands generally to his Wife for the Term of her life; it cannot be averred to be for the Joynture of the Wife, and in satisfaction of her Dower: But if a man deviseth Lands to his Wife for life, or in tail, for her Joynture, and

(r) Pasch. 37
H. 8. Dyer 55.
in the Lord
Latimer's Case.
As in Hughs
Abrid. tit. De-
vise Sect. 6.
§. 9.

(s) Mich. 9. Jac.
in C. B. ad-
judged acc.
(t) Trin. 1653.
in B. R. in
Doomlow and
Shawe's Case.
Vid. 15. Car.
in B. R. Hughs.
Abr. tit. Devise
Sect. 7. §. 14.

(u) Mich. 31
Eliz. in C. B.
Goldsb. 107.

(w) Co. 4 parts
61. Forfe and
Hembling's
Case, & Hughs
Abr. tit. Devise.
Sect. 1. § 52.

and in satisfaction of her Dower, the same is a good Joynture within the Statute of 27 H. 8. (x)
 (x) Co. 4. p. 4.
 in Vernon's C.

15. A man devised the moiety of his Goods to his Wife, and died. It was the opinion of the Court, That she should have the moiety of them as they were at the time of his death, if his Executors had Assets sufficient to pay his Debts. (y) Also if a man hath Goods worth 100 l. and oweth 20 l. and giveth to his Wife the one half of all his Goods, to be equally divided between him and his Executors: By this Devise, the Wife shall have the one half of all the Estate, without any Defalcation. (1)
 (y) 5. Mar.
 Dyer. 164.
 vid. 38 H. 8.
 Dyer 59. Lord
 Latimer's Case
 adjudg.
 (1) Goldsb. 149

If a Legacy be given to a Woman Covert, and her Husband give a Release, and afterwards he and his Wife sue in the Ecclesiastical Court for the Legacy, the party sued shall not have a Prohibition upon the Husbands Release, because the Temporal Judges cannot meddle with a Legacy, nor consequently determine, whether the Release will extinguish the same. As the Case 29 Eliz. Adjudged.

Hill. 7 Jac.B.R.
 in Starkey against
 gain. Barton &
 Gore's Case.
 Yel. Brook. tit.
 Devise 18.

The Husband may devise to his Wife, although they are but one person in Law, for it takes no effect till after his Death.

A Rent was devised jointly to Husband and Wife, the Husband died Testate: The Wife took Administration of his Goods, and as Administratrix brought her Action of Debt for the Arrearages of the Rent behind in her Husband's life-time: It was held in this Case that the said Arrears were due to her *in jure proprio*, and the naming of her self Executrix of her Husband was a Surplusage. (2).

(2) More, Case
 1181.

Lands were devised to E. for life, upon Condition, That she should not marry; and if she died or married, that then the Land should remain to A. in Tail: And if A. died without Issue of his body in the life of E. that then the Lands should remain to the said E. to dispose thereof at her pleasure: And if the said A. did survive the said E. then the Lands should be divided betwixt the Sisters of the Devisor. It was objected, That E. had but an Estate for life; and that these words, *viz.* That if A. dieth with Issue in the life of E. That then the Lands should remain to E. to dispose, shall not be construed to give her a Fee-simple, but to discharge the particular Estate of the danger which might come by her Marriage; and by the Limitation of the latter Remainder, the meaning of the Devisor was not, that she should have a Fee-simple, the Remainder is not limited to her Heirs. But the Opinion of the Court was, That upon the words of the Limitation of the Remainder to E. *Quod integra remaneat vita E.* she might dispose thereof at her pleasure: For the Division is limited to be upon a Contingent, *scil.* If A. survive E. But if E. survive A. then his intent is not that the Lands should be divided

divided, but that they should wholly remain to E. and so E. had a Fee-simple in them. (3)

(3) Trin. 27
Eliz. C. B. Jenner & Hardies
Case. Legon.
283.

C H A P. XVIII.

*Of Legacies and Devises to a Child in the Womb, as
also to Minors.*

1. *A Devise to an Infant in the Womb, is good.*
2. *It may be good, though the Infant be ripp'd alive out of the Womb.*
3. *It is good, though it be a Devise in Remainder, or in Tail.*
4. *How the Dividend of a Devise shall be in case of Twins, unexpected, or an Hermaphrodite.*
5. *How the Legacy shall be apportioned, when bequeathed to any Child in the Womb, and more than one or two happen to be born.*
6. *Where a Devise void or voidable his Inception, may become good by matter ex post facto.*

1. **T**hat a Child in the Womb, to whom a Legacy is bequeathed, or Lands devised, is after his or her birth, though subsequent to the Testators death, capable of taking by such Devise, is a Truth now not to be controverted, though it hath been contradicted, and otherwise resolved; for we find it reported in a Case thus stated, *viz.* A man had Issue five Sons, his Wife being with Child with the sixth at the time of his death; and by his last Will declared, That the third part of his Land should descend and come to his Son and Heir, the other two parts he bequeathed to his four younger Sons by name, and to the Heirs males of their bodies; and if the Infant in the Mothers Womb be a Son, then he to have a fifth part, as Co-heir with his four elder Brothers. The sixth Son was born after the death of his Father: In this Case it was resolved, That the Son born after the death of the Father, should not have any thing, because he was incapable as a Purchaser, when the Devise was first to take effect, because he was not then in *esse* or *rerum natura*. (a) Notwithstanding which, it was not long after in another Case otherwise understood: In which Case it was admitted, That a Devise to an Infant in his Mother's belly was good. (b) It is presumed, the Intendment is of such an Infant, as was born after the Testators death: In other Cases also it hath been held, That a Devise to an Infant in his Mothers belly is

(a) Mich. 14
El. Dyer 303.
& in Hugh.
Abr. tit. De
Seal. 8. §. 1.
(b) Trin. 17
El. Dyer 342.
& Hugh. ibid.
good. §. 2.

(c) Farringdon's good. (c) And there is a Case which saith, That a Devise of Copy-Case vid. 7 hold Land to an Infant in the Mothers womb, is not good in Possession, but that it is good in *Remainder*. (1) By the Civil Law, the Earl of Bedford's Case. even such as are not born at the time of making the Testament, Hughs ib. §. 3. may be appointed Executors, (2) provided they happen to be (1) More, Case born at the time of the Testators death; (3) yea, some are of opinion, That it is sufficient they were at that time but conceived 877.

(2) placet. ff. de Liber. & Post.

(3) Dec. Confil.

37. nu. 4.

(4) L. qui in utero. ff. de Stat. humin.

in the Womb: For by that Law Conception is taken for a being born, when it relates to the Infants benefit and advantage: (4) And Testaments in favour of the Testators Children, shall be good, how imperfect soever otherwise they are; but not so as to strangers: By which word is to be understood there, all that are not the Testators Children: And as the Parent by his Testament ap- portions his Goods among his Children, so they are to have their parts accordingly. (5)

(5) Novel.

Collat. 8. d.

Testa. imper.

§. Nos igitur.

2. A man deviseth his Land to his Wife, being with Child, the Remainder to the Issue *en ventre sa femme*; his Wife in Travail dieth, and the Son rip'd from his Mother alive, he shall have the said Remainder. (d)

(d) Dyer in Stat. Wills, Sect

3. §. 3.

3. If one possessed of a Term of years of Land, and devise the same to his Wife during all the Term, and if she die within the years of the Term, then to A. and B. his two Sons, if they have no Issue male: But if they or either of them have Issue male, then that it shall go to the use of those Issue male; The Wife dies, and the two Sons die without Issue born, one of their Wives being privily with Child of a Son, who after his Fathers death is born: In this Case, and by this Devise, the Issue male shall have it as soon as he is born. (e)

(e) Hill. 13. Jac. in B. R. adjudg. Blanford's Case.

4. Suppose a man possessed of an Estate to the value of 721 l. his Wife being with Child, did devise in this manner, *viz.* Whereas my Wife is with Child, I Will, That if she be delivered of a Son, that then that Son shall have 480 l. 13 s. 4 d. and my Wife shall have 240 l. 6 s. 8 d. But in Case she be delivered of a Daughter, then my Will is, That that Daughter shall have the 240 l. 6 s. 8 d. and my Wife shall have the 480 l. 13 s. 4 d. and dies. It happens, that the Wife is after delivered both of a Son and a Daughter. The Question is, How each Legatary shall be satisfied his and her Legacy, according to the intention of the Testator? for by the Will a Legacy is given to each of them: It is resolved, That according to the Testators intention, which is the Index of the Testament, the Son shall have double to the Wife, and the Wife double to the Daughter; and consequently the Son shall have 412 l. the Wife 206. and the Daughter 103 l. which in all amounts to 721 l. the full value of the Testators said Estate. So that each person is to have a portion answerable to the rate

of proportion mentioned in the Will : (f) But if the Child which the Mother brings forth be an Hermaphrodite, then it shall have the portion due to that Sex whereof the Hermaphrodite doth most participate. (g) But if that also be doubtful, it is presumed according to the more worthy Sex, viz. the Masculine (b)

5. In case a Testator saith, If my Wife bring forth any Child, I give to the same 100 l. and she bring forth two or three Children : In this Case every Child may obtain a Hundred pounds, if there be Assets sufficient, and the Testators Goods will suffice to satisfy the same; otherwise there must be a proportionable deduction. (i)

ibid. Others say, the Legacy must be divided among them. Mantic. Conject. ult. Vol. 1. 4 If he had said, I give to the Child in the womb. 100 l.

6. There is a Case, wherein by the birth of a Child after his Father, the Testators death, a Devise becomes good to another; which otherwise would be void, when none is given to himself : As thus, If one devise his Land to his Daughter and Heir apparent in Fee-simple, this Devise is void; yet if in this Case the Wife of the Devisor be privily with Child of a Son, which is born after his death, now is the Devise become good, for now she is not Heir to her Father. (k) Q.

Mead and Pyriam Justices in the C. B. affirmed, That it had been there adjudged in the Lord Dyer's time, That if Lands are devised to two men, and the Child wherewith the Devisors Wife then goeth, that such Devise is good, and the Child shall take by such Devise : But whether they shall take in Common or Joynt-tenancy the Lord Dyer doubted. (l)

A. possessed of a Lease for years, devised the same to his eldest Son, and the Heirs of his body; and if he die without Issue, then to P. his younger Son, and the Heirs of his body, and for default of such Issue, that the Term should remain to his Daughters. The Testator dies, leaving two Daughters, and afterwards another Daughter is born. The eldest Son sells the Term, and dies without Issue; the younger Son dies also without Issue : The three Daughters enter, and the Term was adjudged to them three, although the youngest Daughter was not born at the time of the death of the Devisor; otherwise, if he had named the two Daughters in the said Devise by their proper names.

In Trespass. The Case was : One devised his Lands to his two Sons, and the Heirs of their bodies, and that his Executors shall have them, until they come to their several ages of 21 years. The one attains to the age of 21 years. The Question was, Whether he might enter? It was said, They were Joynt-tenants, and that the Executors should hold them till they both came of

(1) Mich. 3
Jac. B. R. Ay-
lor & Cheps
Case Cro. 2
par. 259.

the age of 21 years. But it was holden otherwise by the Court ; for the words, until they accomplish their several ages ; viz. *Reddendo singula singulis, quoad* either of them come to the age of 21 years, he should then have his part and possession, and yet the Joynt tenancy should hold place. (1)

A man devised his Lands to his Daughter and her Heirs, when she came to the age of 18 years ; and that his Wife should take the profits of the Lands to her use, without any Accompt to be made, until the Daughter come to 18 years ; and made his Wife his Executrix, and died---Provided, the Wife should pay the old Rents, and find the Daughter at School : The Wife enters, proves the Will, takes Husband, and dies. It was found, That all the Conditions were performed, and that the Daughter was within the age of 18 years. It was resolved in this Case, That it was a Term for years in the Wife, and a good Lease. The other Question was, if this Trust of Education were a Limitation personal, that the Lands should be no longer in the Wife, than she did educate the Daughter. It was resolved, That it was not. (2)

(2) Trin. 17
Jac. C.B. Black-
born's Case.
Hutton 36.

Devise to a Wife, until the Issue accomplish the age of 18 years, endeth not by the death of the Issue before, as was resolved by the Barons of the Exchequer, in a Case there depending ; wherein *A. B.* devised a Term to his Wife, until the Issue of the body of the Devisor, accomplish the age of 18 years, bringing up the said Child : And the Jury found, That the Devisor had Issue at the time of his death, but that the said Issue died before he accomplished the age of 18 years. And the Barons resolved, That the Estate of the Wife of the Devisor is not determined, until the Issue should have come to the age of 18 years ; and Judgment was given accordingly. (3)

(3) Trin. 17
Jac. in the Ex-
chequer. Sweet
& Beal's Case.
Lane. Rep.

CHAP. XIX.

Certain Cases of Devises touching Lands and Chattels-real

1. *The difference in power of devising between him in Fee, and Tenant in Tail or for life.*
2. *What Uses are devisable.*
3. *Money payable upon a Mortgage is devisable, though devised before the day of payment.*
4. *Obligations or Chattels real in right of a Wife, as Executrix or not, are not devisable by the Husband.*
5. *A void Presentation is not devisable: In what kind an Advowson in Fee may be.*
6. *Whether Leases and Rents may pass under the Notion of Immoveables, as also Bonds and Specialties under the Notion of Moveables.*
7. *What shall pass by a Devise of all Goods, Chattels, Moveables or Immoveables.*
8. *The difference between an universal Successor, and a naked Executor or particular Legatary.*
9. *Devise made under Coverture, may be good by new Publication after the Husbands death, otherwise not.*
10. *The same Law as to a Devise made by an Infant during Minority disqualified.*
11. *Not full payment, equivalent to no payment.*
12. *A personal charge incumbent on a Legacy, is to be defrayed by the Executor, not the Legatary.*
13. *Equity in Election to be regulated by the Testators intention.*
14. *Circumstances of a Devise not restrictive, nor joyned to the Devise it self, ought not to minorate the same.*
15. *A Devise shall be interpreted to the utmost Consistency with the Devisers words, to the best advantage of the Devisee.*
16. *Comprehensive words ought not to be extended beyond what is rational in Construction of Law.*
17. *The advantage of a Residuary-Legatary, when others refuse.*
18. *Discrepancy among the D D. touching a Legacy to the poor.*
19. *Accessory advantages to a Legatary between the making the Testament and the Testators death.*
20. *The Devise of a thing not in rerum natura at the Testators death, is void.*

21. *The*

21. *The Testators Estimation of a Legacy doth not alter the Condition thereof.*
22. *The Executor may not exceed his Testators Estimate to a Legataries prejudice.*
23. *The Devise of a part, not expressing what part, implies a moiety.*
24. *Constructions of Law to avoid uncertainty; and the Law touching Elections.*
25. *Where a Legacy is given Nomine pœnæ, and failure in the Executor, the Legatary may take either, but not both Legacy and Penalty.*
26. *Where there happen two Elections in one Devise, the Legatary shall have the first, the Executor the second.*
27. *The Law touching a Devise of a House, where the Testator had none, or many, or burnt, or ruin'd, or pull'd down, or demolished, or re-edified.*
28. *In what Case a Mill joyning to a House, shall pass by a Devise of the House, or not.*
29. *One thing ought not to be comprized under the Appellation of another, beside the Testators Intention.*
30. *One Stable, or one Kitchen to two Houses, shall pass with that devised House, whereto they are most nigh, or most contiguous.*
31. *The Law touching a Devise of a House, with all things therein.*
32. *The difference between a Devise of a Chamber, and the Devise of a Shop.*
33. *The Devise of a Field, carries also the Edifice erected thereon.*
34. *The Civil Law, where the Fee of Land is devised to one, and the Rents of the same Land to another.*
35. *In what Case an errour or mistake in the Testator, may be a prejudice to the Legatee.*
36. *A Legacy or Devise may be inferred as well from the Testators intention as expression.*
37. *A Devise by reason of an Omission of that whereof the Testator said he would make a description, is not void.*
38. *A Legacy to two, whereof one is not, accrews in the whole to the other that is.*
39. *Further Exemplifications of Law touching Devise of Houses, altered, burnt, and re-edified.*
40. *An exception of a thing which is not, is no prejudice to the Devisee.*
41. *The same thing conditionally twice devised by two Testators to several persons, how or in what Case good to either or not.*
42. *By*

42. By a Devise of Ground, doth pass the Edifice thereon, albeit it were erected after the Devise made.
43. How a Devise is to be apportioned, where the Devisees are joyned in the thing devised, but dis-joyned in the manner of devising.
44. A Devise of Lands by a certain Name, carries all of that Name, though otherwise distinct, unless the Testator intended otherwise.
45. Any words that do but plainly declare the Testators meaning, may serve for a Devise.
46. The Executor shall pay the Land-lords Rent for Ground in Lease, the Fruit or Proceed whereof is devised to another for the Term.
47. A mistake in the Testator only of the Situation of the Lands devised, shall not prejudice the Devise.
48. The difference between necessary and voluntary Alienations, prohibited to Devisees by a Testator.
49. A Tripartite Case in point of Alienation prohibited by a Testator.
50. How the Disjunctive [or,] in Legacies and Devises, is frequently understood for the Conjunctive [And.]
51. How the non-performance of a Condition annexed to Devise of Land in Fee, may make the Devise void to one, and good to another.
52. Some Possibilities, Contingencies, and uncertainties, in what Cases devisable.

1. **W**Here a man is seised of a House in Fee, or of Land in Fee, and may devise such House or Land; in such Case he may devise the Doors, Windows, Wainscot, or the like Incidents of the House; also the Trees and Grass growing upon such Land. Otherwise it is with a Tenant in Tail, for life or years in Houses or Lands. (a)

2. If a man hath an Use that is not executed by the Statute of Uses, but remains at the Common Law, he may make a good Devise thereof. (b) And therefore if one possessed of a Term of years, grant it over to another to the use of the Grantor, he may dispose this Use by his Will, for it is in the nature of a Chattel.

3. One that hath money to be paid him on a Mortgage, may devise this money when it comes. If A. Enfeoff B. of Land, upon Condition that if B. do not pay A. 100 l. such a day, that then A. may re-enter: In this Case, A. may devise this 100 l. if it be paid; and the Legacy is good, albeit it be made before the day of payment come. (1)

527.

4. A

(a) Co. 4. 65.
Perk. Sect. 512.
518. Co. 11.
Rich. Lifford's
Case. Kelway
88. vid. l. cæ-
tera l. si quis
inquilinus in
prin. de Leg. 1.
& Pereg de fidei
dei Commiss.
art. nu. 105.
(b) Perk. Sect.

4. A man cannot devise by his Will any real Chattels that he hath only in right of his Wife; nor the Obligations that are made to her alone before or during the Coverture, nor the Chattels real or personal which she hath in right only of another as Executrix. But all her own proper Goods and Chattels Personal, and all Obligations made to them both during Coverture, he may devise by Testament. (c)

(c) Perk Sect.
560. & Dr. &
Stud. cap. 7.

5. A Bishop cannot by his Testament devise the Presentation of a Church that became void in his time; yet if he or the Parson of a Church have the advowson thereof in Fee, and Devise, that two or three of his Executors shall present at the next Avoidance, this is a good Devise. (d)

(d) Trin 13.
Jac. in B. R.

6. By a Devise of Immovables (which are Chattels-real) do pass Leases, Rents, and the like; and by a Bequest of Moveables (which are Chattels personal) will pass Bonds and Specialties; But Debts pass not by either of these Devises. (e) By Immovables are understood, not only the foresaid Chattels-real, but also in some sense Trees growing on the Ground, Fruit on the Trees, Terms of years, and the like; and by Moveables are regularly understood all Goods, both actually moving, and Passively Moveable.

(e) Agreed. Hill.
9 Car. in C. B.

7. If a man bequeath to *A. B.* all his Goods, he shall thereby have the Testators whole Estate (his Lands, Tenements and Free-hold excepted) and thereby the Debts and money. (f) If he bequeath to him all his Chattels, he shall have thereby all as in the former Case. If he bequeath to him all his Moveables, he shall have all his personal Goods both quick and dead; and if he bequeath to him all his Immovables he shall have all the Testators Leases, and all the natural Fruits thereof, as Grass on the Ground, Fruit on the Trees, and the like; consequently Fishes in a Pond, Pidgeons in the Dove-house, &c. as Appurtenances to the Ground devised, as well as the natural Fruits, or Grass growing on the same. (g) And it is held, That by a Devise of *omnia bona*, a Lease for years will pass, if there be no other Circumstances to guide the intent of the Devisor. (1) Yet by a Devise to one of all his Goods and Chattels shall be intended only all the residue, after all the Debts and Legacies paid. (2) One having Leases for years and moveable Goods, grants *omnia bona & Catalla sua*: By this the Leases for years pass not. But yet if one by Will devise *bona & Catalla sua*: by this Devise the Leases for years will pass as aforesaid. (3)

(f) Gloss in l.
his verb. ff. de
hered. inst.
Bart. & Bald.
Ibid. & Stanf.
Prerog. c. 16.
& Tyrac de
retr. art. Lign.
§. 1. § off. 7.
na 18. & old.
Conf. 209.
(g) Kelway.
Rep. 10. 118.

(1) More. Case.
471. 474.
(2) Dyer 59.
164. Bro. Done
43. Kelw. 35.

(3) Ibid.

8. If *C.* devise all his Goods and Chattels to *A. B.* and die, and *A. B.* die also before he hath proved the Testators Will; in this Case the Administration of the Goods and Chattels of the said Testator shall be committed to the next of Kin of the said *A. B.*

A. B. and not to the next of Kin of the said Testator, because in this Case *A. B.* was the universal Successor. (*b*)

(h) Dyer 371.
8.

9. If a Woman under Coverture devise her Land, then publish and approve it after her Husband's death, when she is sole; by this means, that Devise which was originally void, is now become good: But if she make and publish it during the Coverture, albeit her Husband doth afterward die, and she become sole; yet this accident alone, without a new Publication after her Husband's death, will not make that Devise good. The Law is the same as to Goods and Chattels (*i*)

(i) Plow. 344.

10. In like manner, if an Infant within age as to Lands, or within age as to Goods, devise the one, or bequeath the other, and publish the Will; and after he come to full and competent age, publish and approve it again: By this means the Devise or Legacy becomes good; otherwise it is, in case he doth not publish and approve it, when he attains to a full and competent age. (*k*)

(k) Flow. *ibid*.

11. Suppose the Testator doth devise in this manner; *viz.* I Will that my Executors shall pay 100 *l.* to *A. B.* by the tenth day of *March* next after my decease; and if otherwise, then my Will is, That my Executor shall surrender to him all the right I have in a Lease of my Ground called *Black-acre*, and dies. The Executor doth not pay to *A. B.* above 90 *l.* by the day appointed: In this Case, *A. B.* restoring the said 90 *l.* to the Executor, shall have the said Ground; and he may detain the money till he recover the Land. (*l*)

(l) Galgán, &
de Condit. in
part. 2. cap. 5.
9. 15.

12. Suppose the Testator doth devise the Fruits of an Orchard or other Lands, which at a Rent certain he hath taken to Farm for seven years; who shall pay the said Rent, the Executor or the Legatary? It is answered, That the Executor shall pay it, because it is a personal Charge. (*m*) Or if he devise certain Lands which he had lately bought, but the whole Purchase money not paid at the Testator's death; the Executor, and not the Devisee is liable for the same. (*n*) But the Devise shall not take effect till the same be paid, if there be no other Assets wherewith to pay it.

(m) L. qui concubinam. Sect. qui hortos. de Leg. 3. & Pinell. ad leg. 1. De Bon. mat. par. 2. nu. 72. & de Prætitis. lib. 4. int. 1. dub. 3. nu. 14.

13. A man possessed of three Fields, whereof two called *Rushcrofts*, the one being of much better value than the other; the third called *Longlands*, doth devise one of his *Rushcrofts* or *Longlands*, which he will to *A. B.* and dies: In this Case *A. B.* hath his Election, whether he will have one of the *Rushcrofts* or *Longlands*; but if he chuses one of the *Rushcrofts*, it shall be that which is nearest in value to *Longlands*. (*o*)

(n) Charon. Resp. lib. 4. cap. 50.
(o) L. 1. de Dub. & l. ult. De tritico, vino & oleo leg.

14. A man made his Will, and therein devised to *A. B.* all the Lands which he had in the Tenure or Occupation of his Tenant *C. D.* consisting of Meadows, Pasture, and arable Grounds,

situate about the Farm-house of the said C. D. and dies. The Question was, Whether other Pasture or Arable Grounds belonging to the Testator, in the Tenure or Occupation of the said C. D. and by him rented of the said A. B. (but not situate as aforesaid) were to be comprized within this Devise? In this Case it was resolved in the Affirmative: The reason is, because the quality or circumstance of the Place or Situation, is not here, joyned with the Devise for any Restrictions sake, but only by way of Demonstration. (q)

(p) Surdi. De-
cif. 241.

15. A man bought certain Lands of A. B. with a Clause or Covenant of Redemption within a certain time, in the nature of a Mortgage. The time of Redemption being elapsed, the Purchaser made his Will, and therein ordered, That his Executor should restore the said Lands to A. B. paying what Costs and Charges the Testator had been at, and expended about the said Lands. The Question was, Whether the Mortgagor or Vendor, now the Legatary or Devisee, were in this Case obliged to pay the Redemption money over and above the said Costs and Charges which the Testator had expended about the Lands as aforesaid? In this Case it is resolved in the Negative, *viz.* That the Devisee shall have the Land, paying only the said Charges, and without paying the Redemption-money. (q)

(q) L. quibus.
Sect. 1. de
Cond. & Dem.
& Pap. Notar.
1. tit. de legat.
vers. est periti-
nente.

16. A. B. by his Last Will and Testament, makes his two Sons C. B. and D. B. the Joynt-Executors of all his Estate, and dies. C. B. for a certain sum of money sells his part or interest in the said Estate unto D. B. his Brother. After D. B. makes his Will, and therein devises to the said C. B. *all his interest in the said Estate by his Father*, and dies. The Question was, Whether C. B. by that Devise should have all the said Estate whereof the two Brothers were made Joynt-Executors by their Father, or only so much thereof as accrewed to D. B. by vertue of his Co-executorship? In this Case the D. D. are somewhat divided; but the prevailing opinion is, That C. B. by this Devise shall have no more than accrewed to D. B. by vertue of his Co-executorship; because the other part of the Estate was his by purchase, and not by being Executor to his Father; and the Property being altered by the Sale, it ceased to be the Fathers Estate, or any Estate to D. B. by the Father, and became his own proper Estate by purchase.

(r) Recell
Consil. 69. &
Molin. ibid.

(r) But the Question is put a little further; as, Whether the said Devise shall be made good as the said part was when the Father died, or as it was at the time of D. B. the Testators death? In this it is agreed, That the said Devise shall be considered only as the Estate was at the time of the death of the Devisor D. B. and not as it was at the time of the death of his Father. (f)

(f) Molin. add.
Consil. 69.

17. A. B. being possessed of several Houses by Lease, doth devise two of them in his Last-Will and Testament unto C. D. such as he shall chuse; or two of them to C. D. whether he will, the rest to J. G. In this Case, if C. D. refuse to take by this devise, and will chuse neither of the said Houses, J. G. shall have them all. (t) A. devised unto B. the residue of his Goods after his Debts and Legacies paid; and after in the same Will devised, That his Overseers should enter into his Lands, and cut so much of his Woods as to satisfy and pay his Debts and Legacies, the Goods being sufficient, but not the Wood to do it. Q. By which Devise shall B. take? (1)

(t) L. cum aprio de option. Leg.

(1) Moore. Case 10; f.

18. A. B. makes his Will, and thereof C. B. his Son the sole Executor: In which Will he appoints, that a fourth part of his Estate shall be given to the poor, in case C. B. die without Issue. C. B. survives the Testator, hath a Son, makes his Will, and therein ordains, That if his Son should happen to die Intestate, and without Issue, that then the Contents of A. B. his Fathers Will should be performed, and dies, leaving Issue a Son: After the said Son of C. B. dies Intestate, and without Issue. In this Case some are of opinion, That the said fourth part of A. B. the first Testators Estate is not due to the poor, because that general disposal which C. B. made in his Will, ought to be understood only of such things as might be claimed by the first Will, and which could be due only by the same. (u) Others conceive, That it is due to them, in case there were no other Legacies contained in the Will of A. B. which his Son C. B. was to see performed and discharged.

(u) Alex. Conf. lib. 6. Conf. § 1. & ibid. Melin.

19. If a man doth devise Land whereon is no House at the time when the Testament was made, but one is built thereon before the Testator dies: In this Case, the House as well as the Land shall pass by this Devise. (w) Likewise if a Testator devise a Bond or Debt, owing to him by some Goldsmith or Banker, the principal whereof hath produced an increase by the Interest thereof since the time of making the Devise: In this Case, by the Civil Law, the Legatary shall have such interest in the Bankers hands, as well as the principal, which accrewed by vertue of the principal during the Testators life, after the making of the Testament; (x) which by that Law holds true in all Credits producing an Interest or Accessory profit; yet it is otherwise, even by that Law, as to annual Rents payable out of Land; for therein the Civil doth agree with the Common Law, That the arrears of such Rents behind at the Testators death shall go to the Executor, and not to the Legatary, to whom the Land is devised. (y)

(w) L. si ex toto Sect. si ariæ. De Leg. 2. & Gomez. Resol. Tom. 1. c. 12. nu. 16. (x) L. ult. Sect. Cai. De Libertat. l. nom. c. Leg. 3. De Practis lib. 4. int. l. dub. 7. nu. 65. & Alex. lib. 7. conf. 25. cum multis aliis. (y) L. quæ situm. Sect. si mihi. De legat. 1. & Peregr. ait. 48. nu. 10.

(2) Angel.

Mat. lib. 1. cap.

19. & Legat.

20. If the Legacy be not in being, *in rerum natura*, at the time of the Testators death, then neither the thing bequeathed, nor the value thereof, is due to the Legatary ; but if the thing devised is only by any Impediment obstructed from being delivered in kind, then the Devisee shall recover the true value thereof. (2) But a Devise by a man to his Heir or Heirs is void--
Anderf. 2. 11. 3 H. 6.

(a) Mantic. lib

9. tit. 8. num. 2.

(b) Ranch. De-

cif. part. 1. Concl

335 tit. &

Mantic. 1. 9.

tit. 1. nu. 25.

(c) Ranch.

part. 1. Concl.

314. & de

Prætis. lib. 4.

int. 1. Dub 5.

nu. 17.

(d) Ranchin. d.

concl. 315.

(e) De Prætis.

l. 4. in a 3. dub.

3. nu. 29.

(f) Mant. d.

tit. nu. 2:

(g) Rebuff. ad

l. nomen. Sect

Portionis. de

verb. Sig.

(h) Rebuff. ibid.

21. If a Testator devise in these words, *viz.* I give unto *A. B.* my Land called *Blackdown*, which I value at 100 *l.* this Estimation thereof by the Testator, shall not alter the Condition of the Legacy, as if the Executor thereby, paying 100 *l.* to *A. B.* he shall be barr'd from having the Land, in case it be more worth.

(a) On the other side, if the Land be less worth than 100 *l.* the Executor is not obliged to supply that undervalue ; nor if it be more worth, may he retain the overplus. (b) Or if the Testator say, I give to *A. B.* my said Land, and my Will is, That if it be worth less than 200 *l.* that then my Executor shall make it up so much worth to him : In this Case, if happily the said Land be found to be more worth, the Devisee is not obliged to restore the overplus value. (c)

22. If a Testator doth appoint, That his Executor shall sell such Lands to *A. B.* at a price certain, limited by the Testator, the Executor must abide by that price which is so limited by the Testator, though the Land be much more worth. (d) Likewise if a Testator doth by way of Condition to a Legacy, enjoin the Legatary to do some special thing ; as, the repairing of a Church, or the like ; which being finished, the Reparations exceed the value of the Legacy : In this Case none but the Legatary shall bear that overplus of expence in the said Reparations. (e) And if an Executor be appointed to give me such Lands or 100 *l.* In this Case, if he doth not deliver me the Land, I must have the 100 *l.* be the Land more or less worth. (f)

23. If a Testator devise part of his Lands called *Watermead*, to *A. B.* not expressing what part, the Devise shall not be void, by reason of uncertainty, but *A. B.* shall have the one moiety thereof : And if the Testator himself had but a moiety therein, or other lesser part, the Devisee shall have the one half of what the Testator had therein. (g) But if the Testator saith, I give to *A. B.* that part of the House which I inhabited, or was wont to make use of for my Habitation ; if it be uncertain, and cannot well appear which part of the House that was, *A. B.* shall have the whole House, so as no other than the Testator did inhabit or used to dwell therein. (h)

24. A man having several Houses in the City where he lives, and others in other places, saith in his Will, I give one of my Houses

Houses to *A. B.* In this Case *A. B.* shall not be excused his Legacy by reason of uncertainty, but shall not have one of the Houses situate where the Testator lived : (i) Or if he saith, I will, That *A. B.* shall have one of my Houses ; he shall chuse which he will have : But if the Testator say, I will that my Executor give one of my Houses to *A. B.* In that Case, the Executor hath the election to give him which he pleases. (k) And in case the Legatary having the Election, makes more than necessary delays in determining his Election, the Ordinary at the Instance of the Executor, may fix him a time within which he shall finish the same, in default whereof he may decree the Election to the Executor. (l) But if by the Testator's Will the Election be neither in the Executor, nor in the Legatary, but in a third person : In such Case, that third person is to make the choice within one year next after he shall be thereunto required, otherwise the Election devolves to the Legatary, whose choice in such a Case is not to exceed the Rule of Mediocrity. (m) And if the Legatary happen to die before such Election made by him, his Executor shall have it. (n)

25. If a Testator doth by his Will appoint, That his Executor shall within a certain time deliver into the right and possession of *A. B.* such or such Lands by name, under the penalty of 100 *l.* In this Case, *A. B.* (the time being elapsed, and the Land not delivered) shall accept the penalty, he may recover the 100 *l.* but not the Land : But if he accept not the penalty, he may recover the Land, and not the 100 *l.* (o)

26. If a Testator in his last Will and Testament doth devise in this manner ; viz. I give unto *A. B.* one of my Meadows, or one of my Houses : In this Case, the first choice is in the Legatary, whether he will have one of the Houses, or one of the Meadows : But then the second Election is in the Executor, that if the Legatary chuse a House, the Executor shall appoint him which he shall have. (p)

27. If the Testator devise a House, not expressing what House, it is a void Devise, if he had no House ; but if he had several Houses, it shall be presumed to be that House wherein he usually dwelt, if his intention appears not to the contrary. (q) And if the House devised afterwards happen to be burned, the ground whereon it stood is due, and belongs to the Devisee. (r) But if it were pull'd down by the Testator himself, and not re-edified, it is otherwise ; (s) for that implies a Revocation of his mind and will. But if a House devised happen to fall in the lifetime of the Testator, the Legatary shall have the ground whereon it stood. (t) Or if one devise a House called the *White-Swan*, where one *Nichols dwells*, who in truth hath but three Rooms in it, yet this is a good Devise for the whole House, and the whole shall

(i) Grass. §. legatum q. 62.

(k) L. Plane. §. pen. de Legat. 1. & l. 19. 23 l. 6. ita § ult. de Leg. 2.

(l) Bran. Grimmer. l. 1. c. 16. De usus l. mancipiorum l. si Optio de Option. Legat.

(m) L. ult. C. Commun. de Leg. & De Prætit. int. 1. dub. 3. fol. 5. in fin.

(n) Ranch. Decif. pater. concl. 387 & Guid. Pap. q. 214. Charond. Resp. l. 7. c. 95.

(o) Galgan. part. 2. cap. 5. q. 6. De Conditionis.

(p) Papon. Notar. 1. lib. 10. tit. de Leg. vers. cela. pag. 710.

(q) Menoch. d. Præsum. lib. 4. Præf. 129.

(r) Mantic. l. 9. rit. 2. nu. 35.

(s) L. si ita legatum. §. ult. de Leg. 1.

(t) L. qui usus pais f. De usus. 10.

- (1) Cro. 3. 430. pass by such Devise. (1) For one having a House in *D.* called the *Swan*, whereof he had the Entry, and three upper Rooms wherein himself dwelt, in his own possession (others dwelling in other parts of the same House;) made his Will in this manner, *I give the House wherein I dwell, called the Swan in Old-street to A. B.* And it was held, That by this Devise, not only the three upper Rooms, but also the whole House did pass. But if the House had not been named by the name of the *Swan*, and he had devised the House in his own Occupation only, by such Devise possibly, no more than the Entry, and the three upper Rooms would have passed. (2)

(2) Co. 4. 44.
vid. Hill. 10
Car. Ret. 752.
Cro. 3. 129.
Chamberlain
vers. Turner.

28. Supposing there be a Mill joyning to the House which is devised, or it be erected at the end of the Wall of the House, or situate at the end of the Orchard belonging to the House: The Question is, whether it shall pass to the Legatary with the Devise of the said House? In this Case, if the Mill was built by reason of the House, and to Grind for the use of the Family thereof, it shall then pass in the House with the Devise thereof: Otherwise, if it were built to produce an annual Rent, or to grind for any strangers whatsoever, unless it stands upon part of the ground of the very principal Mansion House, and within the Precincts of the same. (u)

(u) Molinæ.
gloss. 5. nu. 5.

29. Suppose a man doth purchase certain Tenements of *A. B.* and certain Tenements of *C. D.* with one and the same price, and with the same sum of money; and after doth devise *A. B.*'s Tenements in these words, *viz.* I do give and devise *A. B.*'s Tenements, as I bought them, unto *J. G.* The Question is, Whether *C. D.*'s Tenements do also pass by that Devise? It is resolved in the Negative, unless it doth appear by sufficient proofs, that the Testator's intention was to comprize the one under the Appellation of the other; or unless the Testator used promiscuously to receive and place to Account the Rents of both in the Name only of *A. B.*'s Tenements (w)

(w) 1. Prediis.
De Legat. 3. in
§. Titio.

30. If a man having two Dwelling-houses joyning together, which have but one Kitchen, or but one Stable in common to them both, devise one of these Houses, the Kitchen and the Stable shall pass with that House they joyn nighest unto, and through which the passage commonly is unto them, or which if demolish'd, the Kitchen or the Stable could not remain useful. (x)

(x) Alex. lib.
3. Consil. 54.

31. If a House be devised with all the things in it; it is to be understood only of those things that were in it when the Testament was made, and not of those things which the Testator brought into it afterwards: Likewise if a House be devised with all the things that shall be found in it when the Testator dies,

it is not to be understood of such things as were brought into the House without the privity or knowledge of the Testator, or which were casually and by chance brought into it: Contrariwise such things as were casually carried out of the House shall not be excluded out of the said Legacy or Devise; (y) nor any moveable Goods in the House which are not momentaneous, but ever remaining there as of Domestick use: For which reason Debts upon Bills or Bonds, Money and Wares designed for Merchandize, and the like, are not within the said Devise of a House with all things in it. (z) Yet one that hath the Fee simple of a House that is devisable, may devise the Doors, Windows, Wainscots, and the like Incidents of the House: But where the Land and House it self is not devisable, such Incidents are not devisable. And therefore a Tenant in Tail, for life or years, of a House, cannot devise such things. The Law is the same for Grass growing on a Ground, with the same difference. (1)

32. If a man devise his Chamber, he is to be understood rather to have devised the things belonging to the Chamber, than the place. (a) But if a man devise his Drapers Shop, he is to be understood to have devised the Place rather than the Wares therein: For that the word [*Drapers*] serves only by way of Demonstration to shew what Shop he meant: Otherwile, if he say, I devise my Shop and Cloth: In that Case it shall be understood the Cloth in the Shop. (b)

33. If a man devise a certain Field wherein any Edifice or Building doth stand, that Building doth pass by such Devise of the Field, if not expressly excepted in the Devise; (c) yea, albeit the Edifice were erected after the Testament was made; but if the Field be devised (excepting the Edifice thereon) the ground, in case the building should be demolished, is likewise excepted out of such Devise. (d)

34. If a man should devise the Fee of certain Lands to one, and the Rents, Profits, and Issues of the same Land to another, and both in the same Will: In this Case by the Civil Law, the Rents thereof are equally to be divided between the two Legacies. (e) And by the Common Law, if a man devise Land to one, and after in the same Will devise Rent to another, it is a good Devise, viz. That the whole may be, first of the Rent, and then of the Land: And so if a man devise Land to one, and after in the same Will devise it to another, that the whole may stand, they shall be Joynt-tenants. (2) Also a Devise of the Profits, is a Devise of the Land; for if a man grant Land, reserving the profits thereof, it is a void Reservation. (3) And although a Devise of profits of Land be a Devise of the Land it self, if there be no other circumstance in the Case; yet where the Devisor doth de-

(y) L. si ira legatum de Leg. 3. & Mart. l. 12. tit. 2. nu. 46.

(z) L. quantum. §. Papi-nianus, de instrum. Leg. & l. Leg. 3. & Mart. ubi sup. Ranchin Decis. part. 3. Corol. 280. Ang. M. thea. l. 2. c. 17. nu. 23. de Leg.

(1) Co. 4. 63. Perk. Sec. 512. 518. Co. 11.

Liford's Case, Kelw. 22.

(a) Mart. l. 9. tit. 2. nu. 49. & De P. is. l. 4. int. 1. cub. 7.

ru. 19. pag. 308.

(b) Mart. de nu. 52.

(c) L. si ira. infim. de fundo instrum. Leg.

Chopinus. l. 2. c. 3. de Privil. Ru.

(d) Mantie d. tit. 2. nu. 23.

(e) §. 1. Inst. de usufr. & l. si

proprietatis. De usufr. ad crescend.

(2) Hil. 13 Jac. 2 R. Blandford

ver. Blandford. Rol. Rep.

(3) Rol. idid.

clare,

- (1) Mo. case
985.
(2) Mo. case
871. Rayman
verf. Gold.
Styles Regift.
83. (3) Co. 8.
94. Plow. 525.
Brownl. 1. 80.
Anderf. 2. 123.
124. 134.
(f) Menoch. de
Præf. lib. 4.
Præfump. 145.
(g) Surd. De-
cif. 142.

clare, That the poor Kindred to whom he devised the profits, shall not have his Term in the Land it self, and he appoints a Lease to be made for Rent, and the Rent to be distributed amongst them, and hath made Executors : In this Case the Executors shall have the Term, upon the Consideration to make the Lease and Distribution, and that the poor Kindred shall have only Trust, and no Interest in the Term. (1) But regularly in a Will, a Devise of the profits of Land, is a Devise of the Land it self. (2) For by the Devise of the profits, Use or Occupation of Land, the Land it self will pass. (3)

35. Suppose a man in his Last-Will and Testament saith, I give unto my Wife the Tenement, and 700 l. which I had with her in Marriage, when as in truth he had but 600 l. with her beside the Tenement : In this Case he shall have 700 l. with the Tenement, (f) unless it can be sufficiently proved, that the Testator did think or conceive that he had 700 l. with her in which Case there is only 600 l. and the Tenement due to her by the said Legacy or Devise. (g)

36. A Legacy or Devise may be inferr'd from the mind and intention, as well as from the express words of the Testator. As thus, A. B. constitutes his two Sons his Executors, and in his Will says, That they shall not in any Case Alien the Leases and Rents, which out of his Estate are about to come to them, but shall preserve them for Succession, viz. of their Children ; and ordered it so, that he made his two Sons enter into Recognizance to observe his said Injunction accordingly, and dies. The Successors of the said Sons claim and demand the said Rents and Leases by virtue of the said Devise. They cannot *de jure*, but after the decease of both the said Sons, it shall come to their said Successors, not before. (b)

- (h) Gloss. in §.
pater filios l.
pater filium.
De Legat. 3.

37. The omission of the quality or description of a Devise in a Will, albeit the Testator therein said he would insert the same, doth not vitiate or null the Devise. Therefore if a man devise certain Lands and Tenements with their Appurtenances, situate nigh a Town, to the Corporation thereof ; and in his Will saith [Which Lands and Tenements, with their Appurtenances, I shall after in this my Will describe, and set forth the just bounds and limits thereof ; as also, what I would have the said Corporation annually to do in remembrance of me, for and in consideration of this my Devise :] But being by death prevented, doth neither of these ; the said Devise is notwithstanding good. (i)

- (i) L. cum pa-
ter. § vicor.
in gloss. ibid.
De leg. 2.
(k) Gloss. in l.
Si quis legave-
rit de Legat. 1.

38. If Land be devised to A. B. and C. D. when A. B. is not in *rerum natura*, C. D. shall have the whole. (k)

39. A Testator doth devise certain Houses to A. B. after the death of his Executor, and dies; the Houses happen to be burnt, living the Executor, and by him re-edified, the Executor dies: In this Case, the Executors Executor is obliged to surrender the the Houses to A. B. but he may deduct the charges of re-building them, if they were not burnt by any default of the first Executor; otherwise not. (1) But if they were burnt in the Testators life-time, and by him rebuilt, or others erected in the same place: In this Case the Devise is void, unless it appears that the Testators mind was otherwise. (m) But if they were only mended, altered, and repaired so often, that there remains now nothing of them at the Testators death, as when the Testament was made: In such Case the Devise is good. (n) The Law is the same, in Case of a Ship or other Vessel so often repaired, that little or nothing thereof now remains at the Testators death, which was at the time of making the Testament.

40. A. B. possessed of certain Lands called the *Mill-fields*, in one corner whereof stood a little Vineyard, made his Will, and therein devised in this manner, *viz.* I give unto J. G. my Lands called the *Mill-fields*, excepting the Vines which shall be therein at the time of my decease. A. B. after the making of the said Testament, and before his death did cut down the Vines which were in the corner of the said ground, and dies. The Question is, Whether the corner of the said ground where the Vineyard stood shall pass by this Devise; It is held in the Affirmative, (o) grounded upon that Rule in Law, *Exceptio rei quæ non reperitur, nihil imperiat.* (p)

41. A. B. by his last Will and Testament doth devise a certain House to C. C. in case his Ship returns within a year safe home from the *Streights*, makes his Executor and dies. The Executor doth devise the same House to J. G. under another Condition. Depending that other Condition the said year expires, and the Ship not return'd from the *Streights*; whereby the first Condition of the Devise to C. D. fails: In this Case, the Devise made by the Executor under that other Condition, if performed, is good: otherwise it would be, in case the former Condition had been accomplished: In which Case, the Devise made by the Executor would have been void. (q)

42. If a man devise a certain parcel of ground, and after erect an Edifice thereon, the Building or Superstructure as well as the ground doth pass by that Devise, and the Devisee shall have them both; (r) because the Rule in Law is, *Quod ædificatur in area Legata, cedit Legato.* As we use to say, *Cujus est solum ejus est usque ad cælum.*

(1) Gloss. in l. Domus de Legat. 1.

(m) L. si ita Legatum. § si Domus de Leg. 1.

(n) Ibid. & Bart. in d. Leg.

(o) L. si quis legaverit. de Leg. 1. & Gloss. ibid.

(p) Bar. in dict. l.

(q) Gloss. in l. si fundam. § cum statu lib. de Legat. 1.

(r) L. si arez. de Legat. 2. & Bart. in dict. L. superficies sequitur solum, gloss. min. l. r. in l. si tibi homo de Leg. 1.

43. Suppose the Testator doth devise on half of his Lands in *Dale* to *A. B.* and doth devise the same half part of the same Lands to *C. D.* and doth devise all his Lands in *Dale* to *J. G.* and so joyns them all in one thing, and dis-joyns in and by the words: In this Case *J. G.* ought to have one moiety of the Lands; *A. B.* and *C. D.* the other moiety. After *C. D.* dies before the day of the performance of the Devise, by which means his part accrews to his Collegataries by way of Accession (or as we say by way of Survivorship) and not to his Heir nor Executor; Therefore as *J. G.* had more in the Devise than *A. B.* so now he hath more than *A. B.* in that part of *C. D.* (s).

(s) Gloss. in l.
Maxim. de Leg
2.

44. *A. B.* possessed of divers Lands and Tenements, among which were certain Lands called *Lillystones*, and so called time out of mind; but in regard of its great extent, he did for the better and more commodious letting it to farm, divide it into two parts, and called the one *Upper Lillystones*, the other the *Lower Lillystones*. *A. B.* makes his Will, and therein gives divers Lands and Tenements to his Niece, among which he gives *Lillystones*, not saying, whether the Upper or the *Lower Lillystones*. The Question is, Whether his Niece shall have all the said *Lillystones*, or only one of the said divided parts thereof? It is resolved, she shall have the whole, unless the Executor of *A. B.* can prove the Testator intended her only one part thereof. (t)

(t) L. Gaius
Sens & Gloss.
ib. de Leg. 2.

45. A Testator makes his Son Executor, and in his Will saith, Let my *Hop-yard* at the lower end of my Orchard, and my Ground in the Parish of *D.* suffice my Cousin *A. B.* It is a good Devise of the Ground and *Hop-yard* to *A. B.* So likewise, if he had only said, Let my Cousin *A. B.* be contented with the said Ground and *Hop-yard*, or with my House situate in, &c. (u) Note that in this Case, the person of the Devisee must not only (as in all other Legacies) be certain; but also the Land devised must by the description of its Situation, be reduced to an infallible certainty; otherwise the Devise will be void. (w)

(u) Gloss. in l.
fidei commissa
de Legat. 3.

(w) Gloss. min.
ibid. lit. t. verb.
fundus.

46. *A. B.* Rents certain Orchards at 20 *l. per annum*, for the Term of seven years, makes his Will, therein gives the Fruit thereof for the residue of the Term yet to come and unexpired unto *C. D.* and orders his Executor to deliver him the Lease, and to suffer him to enjoy the Fruits of the said Orchards for and during the time aforesaid: In this Case, the Testators Executor shall pay the said Rent, and suffer *C. D.* to enjoy the Fruits thereof; otherwise the Legacy might be nothing worth, or if Fruit fail, worse than nothing. (x)

(x) L. qui qua.
tuor. & Gloss.
ib. de Legat. 3.

47. An erroneous Demonstration by a Testator of the Situation of Lands devised by him, shall not prejudice the Devise; as thus, The Testator in his Will saith, I devise my Lands of *Cammerwel*.

merwel which are in *Ireland*, unto my two Nephews *A. B.* and *C. D.* Also my Lands of *Kirkaven* which are in *Scotland*, and dies. After the Testator's death there are found certain Lands which belonged to him called *Kirkaven*, but they are not in *Scotland*: The Question is, Whether those Lands in the Description of whose Situation the Testator was mistaken, do belong to the Devisees? (y) L. patronus §. liberris, & Gloss. ibid. de Legat. 3. It is answered in the Affirmative, if it appear the Testator had any thoughts of devising them at all. (y)

48. A Testator makes his Son Executor, and in his Will prohibits him from alienating or mortgaging the Estate, or any part thereof, whereto he is entitled by such Executorship, commanding him to preserve the same for his Children lawfully begotten, and dies. The Son for 100*l.* doth Mortgage or sell out-right to *A. B.* such certain Tenements of the said Estate as his Father the Testator left at his death in Mortgage to *C. D.* for 100*l.* and with the Proceed thereof pays off the said 100*l.* to *C. D.* to whom his Father in his life-time had mortgaged the same. The Question is, Whether the Sons Obligation or Alienation thereof to *A. B.* contrary to the Testators express command, be good in Law? It seems not, because of the Testator's Prohibition fortified with a Reason, That he would have it left to his Children lawfully begotten: But the Law is otherwise, and ratifies the Sons Obligation or Alienation thereof to *A. B.* because it was a necessary expedient, and not of his voluntary choice: The Law (z) L. Pater filium & Gloss. ibid. de Leg. 3 touching such Prohibitions extending to voluntary, not to necessary Alienations. (z)

49. *A. B.* makes his Will, and therein devises certain Lands and Tenements to his five Sons by name, under this Proviso or Condition, That if either of them alienated his part thereof to a stranger, that then that part so alienated contrary to his Will, should be and enure to the Crown for ever, and dies. After two of the Sons sell their parts to one of the other three their Collegataries, and die. He after makes *A. B.* a stranger his Executor, gives him the said two purchased parts, and dies. The Question is, Whether the said two parts belong to *A. B.* or to the surviving Collegataries that did not alienate, or to the Crown? It is resolved, That they belong to *A. B.* and not to the Collegataries, nor to the Crown: Not to the Collegataries, because the person of *A. B.* the stranger, is not here to be considered, but the person of the Purchaser who devised it to him, who according to the Testators mind, was one of those to whom the Testator permitted, or tacitly implied, a Sale might be made: And it is only they, not others, that are prohibited to sell their own parts, and therefore the parts which they purchase, are not, as those which they hold immediately from the Testator, prohibited by the ex-

press command, or tacite intent of the deceased, to be alienated to strangers. Nor to the Crown, because the Condition of the Devise, *viz.* Alienation contrary to the Testators meaning (without which the Crown is not entitled thereto) is not existent; for that the parts meant by the Testator, were sold to their Collegatory, and not to a stranger, to whom indeed they were afterwards devised, but not in derogation to the Testators sense and meaning, because not the person of the Stranger, Executor to the Purchaser (as aforesaid) but the Person of the Purchaser himself is chiefly to be considered. (a)

(a) Diſt. 1. §. quindeccm & Gloss ibid. de Legat. 3.

50. Note, That in a Bequest of Legacies, the word [Or] is not so much a Note of *Dis-junction*, as of *Augmentation* (comprehending both;) because in Disposition of Legacies, the Law expatiates the Interpretation, as far as it may have any consistency with the Testators mind and meaning, and will make its measures from the utmost latitude of his intentions: For which reason if the Testator saith, *I give my City-house, or my Country Farm to my Daughter Ann*, she shall have both (b) And this is the common Opinion; from whence notwithstanding there are not wanting, and they not of the *minor D. D.* who recede in their Judgments, and hold, That a *Dis-junctive* in a Legacy ought to retain its force, so as the Executor may be least burdened. (c) Which seems nothing inferiour to Reason in an impartial Balance; yet this may be relied on as indubitable, that where the *Dis-junctive* is placed between two such things as are commonly conceived under the Notions of *Genus* and *Species*, or between the whole and his part, then and in such case it shall be taken for a *Con-junctive*; as if the Testator should say, *I bequeath to my Wife my Plate, Jewels, or such things as I provided for her*; the latter words whereof a *Generical*, the former *Specificall*, she shall have both. Or if he saith, *I bequeath to my Wife my Wine which is in the City, or in the Port*, The Port is held as part of the City, and she shall have the Wine in both. Likewise if any thing be bequeathed to *D. E.* or *F. G.* here in this Case also, the word [Or] shall be taken for the Copulative [And:] So that both of them shall equally take by this Devise, unless the one be of nearer Kin to the Testator than the other; in which Case, the nearest of Kin shall have it for his life, the other afterwards; (d) or unless it can be proved, that the Testator did bear more affection to the one than to the other: In which Case, he to whom the Testator did bear most affection, shall be preferred: (e) Or unless the one of them is not legally capable of the Legacy: In which Case, the word [Or] shall stand, as properly it is, for a *Dis-junctive*.

(b) Graff. Slegarum quaest. 66. & Alex. l. 2. Confil. 163. nu. 4.
(c) Molinae & Covar. Resol. l. 2. c. 5. nu. 10.

(d) L. cum per iter. §. ate. de Leg. 2.

(e) Ripa in C. inter ceteras. de Rescript. Ex. 42. nu. 14.

51. *A.* devised to *W.* his Son for his life, and after to *T.* Son of the said *W.* except the said *W.* his Son purchase other Lands of

of as good value for the said *T.* and then the said *W.* to have the Land so devised to sell at his pleasure, and *T.* to pay to his Sisters 10*l.* per annum. *W.* did not purchase the Land, and died. *T.* (f) Co. 3. Bo-
entred, and paid 10*l.* per annum to his Sisters: And held, That raason's Case 6.
by this *T.* had a Fee-simple, and it was a good devise. (f) Collyer's Case.
Hob. 65.

52. If a Legacy be bequeathed to one when he shall attain unto the age of 21 years, it is a Contingency, and yet a good Legacy. (g) So also it is a Contingency if one devise, That a minor (g) Co. 3. 19.
shall have such a Term or Lease, after that he come to the age of 21 years, and appoint that his Executors shall take the profits thereof in the interim: For in this Case, the minor hath no present interest, but it rests in Contingency. (h) Otherwise, in case (h) Co. ibid.
the Term were devised to the minor, and the Testator appoint, that his Executors take the profits thereof until he attain to the full age of 21 years; for in this Case, the minor hath a present interest. Likewise moneys payable upon Mortgages, are but Possibilities and Uncertainties, yet are devisable: And therefore if a Testator hath such money to be paid him on a Mortgage, he may well devise the same when it comes: Whence it is, That if *A.* enfeoff *B.* on Condition, That if *B.* do not Pay 100*l.* to *A.* such a day, that then *A.* may re-enter: In this Case *A.* may devise this 100*l.* if it be paid; and albeit the Devise were made before the day for payment become, yet such Devise is good. (i) (i) Perk. Sect.
Likewise if *A.* does sell Land to *B.* on Condition of re-entry, if 527 Broo. Sect.
A. pays 100*l.* to *B.* who covenants, that he will not take the 437. Plow. 520.
profits of the Land till default of payment: And after *A.* makes Dyer 272.
a Lease of the Land for seven years to another, and then breaks Field's Case,
the Covenant: In this Case, *B.* may devise this Land. (k) But that 17. Jac.
which is a meer Possibility, and altogether uncertain in all respects, (k) Adjdg.
is no more devisable by Will, than it is grantable by Deed. (l) Foxly & Blake-
man's Case.
(l) Perk. Sect.
320. 521.

One devises his Corner-house in the Tenure of *A. B.* and *A. C.* and the said House is in the Tenure of *A. B.* and *A. D.* and his House adjoining is in the Tenure of *A. C.* And held a good Devise, but that the House in the Tenure of *A. C.* adjoining to the said Corner-house did not pass by it. (1)

One devised his Lands to three Daughters, and said further (1) Cro. 30.
in these words; viz. *I will that every of them be others Heir by 447.*
equal portions. Whereupon it was doubted, when one of them Mich. 31 Eliz.
died, whether the others should hold by Survivorship, as Joynt- Fowler & Owg-
Tenants, or in this Case as Tenants in Common? The whole ley's Case. An-
Court was of opinion for the latter, and not as Joynt-tenants; for derf. Case 129.
that it appear'd, the intention of the Donor was such, in saying, *That each should be others Heir by equal portions*; which could not be if there were a Survivor, for thereby it is not possible the words of the Will can be of any force.

Although

Trin. 38 Eliz.
B. R. & Pasch.
41 Eliz. Ewer
vers. Hayden.
Cro. par. 3.
Pl. 3. Pl. 4.
Vid. Rep. at
large in Cro.
ubi supra.

Although properly Houses pass not by the name of the Land, yet in a Devise they shall pass by the name of all the Land, if the Intendment be not otherwise by some expressions of the Devisor; for though in a Writ nothing shall be demanded or recovered, but according to its proper signification; yet in Wills Expressions shall be taken according to the common Intendment. Wherefore in a Will, by the Devise of his Land, all his Houses may pass, or not, according as it is phrased by the Devisor: For if a man devise all his Land, his Houses shall pass, but if he restrain the word [*Land*] according to his genuine propriety, as arable Land, or doth couple it with Meadow and Pasture: In such case, the Exposition of the word shall be taken according to the common Intendment of the Devisor; or having both Houses and Lands in *A.* and *B.* doth say, *I bequeath to C. all my Houses and Lands in A. and to D. all my Lands in B.* In such Case, and by such Expression the Devisor seems to exclude the Houses in *B.* out of the Devise to *D.* which expressly he includes in the Devise to *C.*

Trin. 36 Eliz.
Ewer vers.
Hayden Moo.
Rep. n. 49.

Moore succinctly reports the Case thus; viz. Debt for Rent, the Defendant pleaded *nihil debet*. Whereupon it was found, That *J. S.* being seised of three Houses, and other Lands, Pastures and Meadows in *Watford* in the County of *Hertford*, as also of a House and Land in the County of *Oxford*, devised the same in this manner; viz. *I give all my Capital Messuage in the County of Oxon, and all other my Lands, and Meadows, and Pasture in the Parish of Watford.* The Devisee brought Debt against the Lessee for years of the Houses in *Watford*: And it was adjudged maintainable, because the word [*Land*] comprehends Houses, and the Houses shall pass by the Devise. The same we have reported by *Crook* in the same Case, whereby the words, [*All other my Lands, Meadows, and Pastures in D. and C.*] a Devise may be good to pass the Testators Houses there. (1) And yet *A.* seised of Houses and Lands in *L.* and also in *W.* in another County, devises all his Messuages and Lands in *L.* and all his Lands, Meadows and Pastures in *W.* It was held, That the Houses in *W.* passed not by this Devise. (2). The reason might be, for that in this Case the Testators meaning was, That by the Contradistinction here put between Messuages in *L.* and Lands in *W.* he intended his Houses in *W.* not to pass by the word [*Lands.*] And yet we find it else where reported, That *A.* seised of three Houses, and other Lands, Pastures and Meadows in *W.* in the County of *H.* and of Land in the County of *O.* devised thus; viz. *I give my Capital Messuage in the County of O. and all other my Lands, Meadows and Pastures, in the Parish of W.* It was held, That the Houses passed by this Devise: (3) For the word [*Land*] in a Will will convey

(1) Cro. 1.
476. Ewer
vers. Hayden.

(2) Cro. 1.
476. 658.

(3) More, Ca.
468.

veigh

veigh a House, if it agree with the intent of the Devisor. (4) ^{(4) More, Case 421. Case ib. Ewer vers. Hayden.} Yet if one having two Houses in *A.* and *B.* devise thus; viz. *My House in A. and my Lands in B.* By this Devise the House in *B.* will not pass. (5) Or being seised of a Messuage in *A.* and of three Houses and Land in *B.* devise his House in *A.* and all his Land in *B.* By this Devise his Houses in *B.* do not pass—*Bridg.* 16. ^{(5) Anderf. 2. 123.}

CHAP. XX.

Cases in Law touching Legacies of Chattels Personal.

1. **C**hattels Personal may be bequeathed to one for life, and afterwards to another: In which Case the first hath only the use or occupation, the other hath only the propriety thereof. So that if one Will that *A. B.* shall enjoy the use of his Household-stuff during his life, and after that it shall remain to *J. M.* This is a good Devise thereof to *J. M.* (a) But if the thing it self be bequeathed to the first of them, then it is otherwise; for the gift of a Chattel Personal, though but for one hour, is the gift thereof for ever. (b) Provided, the Testator make it Absolute, not Conditional. If one devise, That *A. B.* shall have the use and occupation of all his Household stuff during his life, and after his decease, that it shall remain to *C. D.* This is a good Devise of the Property of the Household-stuff to *C. D.* For though a Devise of a *Personal Chattel* to one but for an hour, is a Devise thereof to him for ever; yet understand it only when the property it self thereof is devised: For of the same Numerical thing, in Chattels Personal especially, there may be distinct Devises, when the one refers to the Use, the other to the Property thereof.

2. *Chattels Personal* do pass under the Legal Notion of Moveables, as *Chattels Real* do under that of Immoveables; of both which the Law makes a Distinction into Creatures living, and things inanimate; albeit of the living Chattels Real, there can but very few instances be given: Such was Wardship in respect of the Tenure of Land: As also Villenage for years, or that right which the Lord had in the Villain only for a Term; who resembled him whom the Civil Law terms *Ascriptitius Glebæ*, or one in perpetual Obligation to the Plow on some certain Lands. The Real Chattels inanimate chiefly consist in Houses, or Lands, or the Issues thereof, as by Lease for years, or by extent upon Judgments, Statutes or Recognizances; or if the Testator had a Term

(c) Off. Exec.
cap. 5.

Term of years in certain Advowsons, Tythes, profits of Fairs, Markers, or Court Leets, the Interest is a Real Chattel among the things inanimate : Likewise a Presentation to a Church, upon the next Avoidance, and before it come to be void, is a Real Chattel. (c) But of this, and Chattels Personal, with their respective Individuals, the Reader may have a more exact Description, if he hath a retrospect to *Cap. 6. Part. 3.* whereunto he is referred for clearer satisfaction.

3. *A. B.* having two Brothers and one Son, makes his Son his Executor, and in his Will saith, That he would have his Son let the said two Brothers (who are the Sons Uncles) have all the Goods he hath in *D.* and *M.* or elsewhere ; saying withal, That all these things he doth leave them for this reason, Because he would not that his Son should have any difference or controversie with them : In this Case, and by this Devise, *A. B.* seems to leave his two Brothers only what was in common between him and them, and no more : This Interpretation being grounded on the Reason annexed at the close of the Testators words, where he saith, [Because his Son should have no difference or controversie with them :] By which Reason he seems to have a prospect of differences like to arise between him and them, by occasion of some Goods in common between them (as is usual in Cases of such Community :) And thence seems by such words added to the Bequest, to prevent such probable differences, not intending to include within that Legacy such Goods as were not like to

(d) *L. cum pa-*
ter. §. Dulcissi-
mis & Gloss.
ib. de Leg. 2.

cause any difference between them. (d)

4. The first Declaration of the Testators mind Derogatory to the second, prevails against that second, unless thereby the first be specially revoked : And therefore if a Testator in the beginning of his Testament, saith, That to whom I shall bequeath twice, I would have it due but once ; and then gives a Horse to *A. B.* After in another part of his Testament gives his Books to *A. B.* And after that towards the end of his Testament saith, It repenteth me that I declared my self in that manner in the former part of my Testament, for I incline that *A. B.* should have my said Books and the Horse : In this Case, the Legatary shall have them both, notwithstanding what the Testator said in the former part of his Testament ; for a Testator cannot in his Will impose

(e) *L. Si quis in*
principio. &
Gloss. ibid. de
Legat. 3.

such a Law on himself, as from which by his Will he cannot recede ; because only that which is indeed his Will, is his Law, and a Law unto it self, and that alone shall stand. (e)

5. If a man doth devise to *A. B.* all that he doth possess in *London*, by such general words shall pass all that he hath in the Suburbs, as well as in the City : But his Books of Account, or Cash in his Chests, which he hath either in the City or Suburbs, do not pass by such general words in a Will. (f)

(f) *L. uxorem.*
§. legaverat &
Gloss. ibid. de
Legat. 3.

6. If

6. If I bequeath 100 Books, the Legatary shall have 100 Volumes of Books, not computing the several Books that may be in one Volume, as so many of the 100. And if I bequeath him my Study or Library, he shall have only the Books, not the place where they are, nor other things that may be there. (g)

(g) L. *librorum*
& gloss. *ibid.*
de Legat. 1.

7. If a man devise his House to A. B. with all the things therein when he shall die; such things as are there only by chance, and did not use, or were wont to be there, do not pass by that Devise; yet such things shall pass as only by some accident were not found there, but used to be there: But money found there, which not long before was received from Debtors, and intended to be again lent out, doth not pass by such Devise. (h)

(h) L. *si ita* Legatum. & Gloss. *ib.* de Leg. 1.

8. If I bequeath Materials fit to make a Ship, and after do build a Ship therewith; the Ship doth not pass by that Devise. Or if I bequeath a Ship, and after do rip abroad that Ship, the Legatary shall not have the Materials thereof; yea, though another Ship be afterwards built of the same Materials, he shall not have it. Yet if I bequeath a Wedge of Silver, wherewith any Vessel is after made, the Legatary shall have it, so as the form or fashioning thereof be not of more value, or cost more than the Silver it self is worth. (i)

quantum *habet* *Ship*
be after so often
repaired, that
there remains
nothing of the
same Ship but
the Keel, the
Legacy is good.
l. *quod in rer.*
nat. §. *ult.* ff.
de Leg. 1.

9. A Testator had six Marble Statues, and a great quantity of other Marble: He deviseth two of his Marble Statues, and all his other Marble to A. B. Whether by this Devise may the Legatary claim the Six Marble Statues? It is answered Negatively, he can have but two Marble Statues: because when the Testator gave him the Statues so specially and numerically both, he seemed not to intend the Legatary should have the other four by that Devise: If so, he would not have specified in two, had he intended six; (k) but rather, in all probability would have mention'd six instead of two; but if the number, or the names of the Statues bequeathed, be not specified in the Legacy, they will all seem to pass under the Genus of Marble *ex abundantia*. (l)

(i) L. *iana* &
Gloss. *ibid.* de
Legat. 3.

(k) L. 1. de
aur. & argent.
legat. & l. *lega-*
ta de Supellect.
legat. & l. *hæres*
meus §. *duz* &
Gloss. *ib.* de Le-

10. A man having two Horses, doth in his Will say, I give to A. B. the two Horses which I shall have when I die: After the Testator sells his two Horses, and at his death is found to have only two Mares: In this Case, the Legatary shall have the two Mares; because in construction of Law the Feminine in such Cases is compriz'd in the Masculine. (m)

(l) Dist. 1. *lega-*
ta & *Cuiac.* in
dist. 1. in toto.
(m) L. *qui*
duos & Gloss.
ibid. de Legat. 3.

11. If a man indebted 20 l. hath Goods worth 100 l. and gives to his Wife the one half of all his Goods to be equally divided between her and his Executors: In this Case, the Wife shall have the one half of all the Estate personal, and that without any Defalcation. (n)

(n) Goldsb.
164. pl. 74.

(o) Vid. Swinb.
par. 7. §. 10.
verf. fin. §.

(p) Swinb. ubi
supra.

(1) Perk. Sect.
520.

(q) Servis leg.
de leg. 3.

(r) L. grege.
de Legat. 1. &
gloss. ibid.

12. Under the notion of Household-stuff, is not to be understood in any Will or Bequest, any Apparel, Books, Weapons, Tools for Artificers, Cattel, Viſtuals, Corn in the Barn or Granary, Wains, Carts, Plow-gear, or Vessels fixed to the Freehold. (o) As for Plate, it is the common and fairest Exposition to understand only so much thereof within the notion of Household-stuff, as the Testator himself in his life-time did so understand, and as much thereof as himself did esteem rather as Utensils than Ornaments, and accordingly made use thereof rather for the daily and ordinary service of his House, than for Ornament, Pomp, or Delicacy. And as touching Coaches, whether they are within the Notion of Household-stuff or not, I suppose the Reader will not easily be persuaded to join with those in their Opinion, who hold it in the Affirmative; (p) unless he will also allow the Plow and the Cart (which are of more Domestick use and service than Coaches) to have the same privilege with the other.

13. A Testator may bequeath the Corn growing on his ground at the time of his death; yet if he be a Lessee for years, and sow the Land so short a time before the Expiration of his Lease, that the Corn cannot possibly be ripe when the Term expires, and he die before such Expiration of his Term: In this Case his Bequest of such Corn is void, because himself, if he had lived, could not have reaped it after his Term expires. (1) Otherwise where the Corn is sown and growing upon a man's Ground at the time of his death, is such as himself might have reaped, if he had lived to the Harvest; for such Corn is devisable by the Testator, therefore if a man having Land in Fee-simple, Fee-tail, or for life or years (qualified as aforesaid) sow it with Corn, he may devise it at his pleasure: As, if the Husband sow the Land which he holds by any of the said Tenures in right of his Wife, and die ere the Corn be ripe: In this Case, the Husband's Executor or Administrator, and not the Wife, shall have it. The Case is the same for a Tenant's Executor or Administrator, in case he for whose life the Tenant that had sowed the Land, hold, dies before the Corn be ripe.

14. If a man bequeath all his Sheep, neither the Rams nor the Lambs are comprized therein; but if he bequeath his Flock of Sheep, they are both therein comprized. (q) Or if he bequeath twenty Sheep which he hath in his Flock, and which indeed is all his Flock, the Legatary shall have them all, because by this he bequeathed his Flock of Sheep. (r) Likewise if one bequeath his Flock or his Herd to me, and living the Testator, some of the Flock or Herd die, and others put into their stead: In this Case the Legatary shall have them, because it is the same Flock or Herd as formerly. But what if one of them die, in that Case, and notwith-

notwithstanding such Diminution, the Legatary shall have the nineteen, though it be the Flock which the Testator bequeathed. Likewise if nineteen die, so that but one only remains, the Legatary shall have but one. Also if a House be devised, which (f) *L. si grege.* is after burnt, the Legatary shall have the Ground whereon the *de Legat. 1. &* House stood. (f) *gloss. ibid.*

15. *A. B.* deviseth his Horse to me and thee, willing that each of us should have the Horse entirely: In this Case one of us shall have the Horse, the other of us the value or price of that Horse. (t) *(t) L. si mihi* And in case (the Testator being dead) thou after make me thy *de Legat. 1.* Executor, who was before thy Collegatary, I shall have the whole Legacy, that is, mine if I will, or thine if I will, and if (u) *Gloss. in* I take by the one, I cannot claim the other also. (u) *dist. 1.*

16. A Testator sick in *London*, there makes his Will, wherein he appoints his Executor to deliver the Horses he had at *Edinburgh* in *Scotland* to *A. B.* (then also at *London* with the Testator) the third day next after his decease, and dies. The Question is, Whether this Legacy be good or not? It seems not, because of the distance of place rendring the performance of the Legacy impossible at the time limited by the Testator. But the Answer is, the Legacy is good and possible, nor ought the distance of place to prejudice the same, in regard the Testator might after the making of the Testament possibly live long enough to have the Horses brought from *Edinburgh* to *London* timely enough to have the Legacy performed by the time limited by the Testator, (w) if there were nothing else to be said in the Case, as *(w) Dist. 1. si.* indeed there is. *mibi.*

17. If the Testator saith, I give *A. B.* my Diamond Ring which I believe is in my Cabinet, but in truth is at that time in the bottom of the Sea, his Executor is not obliged to pay the value thereof to the Legatary, nor to deliver it till it can be got out of the Sea, and then he shall be no less legally than miraculously obliged. (x) Or if a Testator bequeath twenty Gallons of Canary out of such a Hoghead, and there be found but ten Gallons in it, the Legacy is not invalid; for the Legatary shall have the ten Gallons; but no more. (y)

18. A Testator gives and bequeathis an Ox to one, the Ox dies before the day comes for the delivery of him to the Legatary, he shall have neither his Flesh nor his Hide; otherwise if he had died after the day for the delivery thereof was come. (z)

19. A Testator in his Last-Will and Testament saith, *I Will, That after my decease my Executor hereafter named shall pay 50 l. per annum to my Wife, whilst she shall be with my Son in London.* The Son went from his Mother, yet staid in *London*, but not with his Mother. The Question is, Whether the 50 l. per annum be

due to the Mother? It is resolved affirmatively: But if the Son had gone out of *London*, and the Mother might have followed him, but did not, but continued still in *London*, the Legacy would not be due to her, save only for that year wherein the Testator died; which shall be due, albeit in that year she continued not with the Son above one day: But if the Mother could not follow the Son when he went out of *London*, nor can otherwise be duly charged with any neglect, whereof she continued not with her Son, the Legacy of 50 *l. per annum* shall be due to her. The reason of the premisses is, because the said words, [*Whilst she shall be with my Son in London*,] hath the force of a Condition.

(a) L. qui quatuor S. uxori & gloss. ibid. de Legat. 3.

(b) Gloss. min. ibid.

(a) In like manner, if a Testator bequeath any thing to *A. B.* if he shall dwell in the City with his Son, it is not required, that the Legatary shall dwell in the same House with his Son; but if there be no mention made of any place, as if the Testator should say, [*If he dwell with my Son*] the Condition is not fulfilled by the Legatary, unless he dwell in the same House with the Testator. (b)

20. If a Testator enjoin his Executors to pay unto *A. B.* the sum of Ten pounds *per annum*, and he live six years and four months, the Executors of *A. B.* shall receive Ten pounds for the whole seventh year; because an Annuity is due in the very beginning of every year, where no certain time of payment is set by the Testator. Also if a man be possessed of two Houses for years, and devise them to his Wife for her Life, if she live sole, the Remainder to *A. B.* And if she marry, That then she shall have but one of them during the rest of the Term, [and then addeth these words,] *And also I will that she shall have 20 l. a year out of my other Lands*: In this Case, and by this Devise, it seems the Annuity shall continue during the Term. *Sed Q.* for the Judges were divided in the point. (1) And if one devise an Annuity to his younger Son out of his Land, and Wills, That his Heir shall pay it: By this Devise the Heir of the Heir shall be bound to pay it also. (2) Or if a Bishop grant an Annuity out of his Land to one for life, and die, his Executor or Administrator shall stand charged with the arrears thereof due in the Bishops time. (3)

(1) Pasc. 14. Jac. B. R. Gough and Haward's Case. Bridgm. 52, 53.

(2) Bull. 1. 219.

21. Although a man cannot devise the Lands which he hath not any interest in, nor any right or title unto, nor can devise another man's Land; yet he may bequeath the Goods and Chattels which himself hath not, and the Bequest shall be good: And therefore if a Testator bequeath to *A. B.* 100 Quarters of Corn, or as many Lambs, and Willeth, That the Corn shall be paid or delivered out of the Corn that shall grow on, or out of his Ground the next year, and the Lambs out of his Flock the next year: And there happen to be no such Corn, or not so many Lambs, or not any

(3) Dyer. 370.

any arising or growing as aforesaid, yet this is a good bequest, and to be performed by his Executor, if there be Assets. In like manner, if a Testator bequeath unto *A. B.* a Horse or a yoke of Oxen, and the Testator hath neither Horse nor Ox; yet the Bequest is good, and by his Executor to be performed in Case of Assets. (c) (c) Perk. Sec. 511. 525.

If one Devise a third part of all his Goods and Chattels: By this Devise (according to the opinion of some) there passes but a clear third part after Debts and Legacies paid. But it seems a third part of all is devised, out of which the Debts must be first paid. (d)

A Devise was made of Goods by a Father to his Son, when he should come of age; and if he died within age, that his Daughter should have them: He died within age, and it was held, That the Daughter should have the Goods after the death of the Son, and not tarry till he had been of age. (e) (d) Dyer 593. (e) Anderl.

Not whether Jewels be Chattels, but what shall pass under the Notion of Jewels is the Question: For the Case was: The Earl of *Northumberland* devised by his Will his Jewels to his Wife, and died possessed of a Collar of S's, and of a Garter of Gold, and of a Button annexed to his Bonnet, and also of many other Buttons of Gold and precious Stones annexed to his Robes, and of many other Chains, Bracelets, and Rings of Gold and precious Stones. The Question was, whether all these would pass by the Devise under the name of Jewels, It was resolved by the Justices, that the Garter and Collar of S's did not pass, because they were not properly Jewels, but Ensigns of Honour and State; and that the Buckle of his Bonnet and the Button did not pass, because they are annexed to his Robes, and were no Jewels. But for the other Chains, Bracelets and Jewels, they passed by virtue of the said Will. 26 Eliz. E. of Northumberland's Case, referr'd to Wray and Anderson, vid. Hugh. Abr. verb. probat. of Wills and Testaments.

C H A P. XXI.

Of Legacies touching Goods in general, and what is to be understood under that notion of Goods, and what by Moveables and Immoveables.

(a) L. bonorum. de verb. sign. & Graff. §. Legat. q. 19 & Mant. l. 9. tit. 4. nu. 13. cum multis aliis. (b) Mathae. l. 17. cap. 17. nu. 18. de Legat.

(c) Dist. c. 17. v. 17. & Graff. dist. q. 19. nu. 3.

(d) Pinell. ad Rub. C. de bon. mater. part. 1. nu. 10.

(e) Pinell. ib. nu. 12.

(f) Graff. §. Legatum, ubi supra & Pinell. ubi part. 1. nu. 32.

1. **T**HAT Moveables fall under the general notion of Goods, is out of question ; but, Whether Actions, and Rights of Action, and Suits of Law depending fall under that notion ? is a question. The Affirmative is not only the most received, but (as Orthodox) the best approved Opinion ; (a) though much opposed by some of the Learned, who will not admit such Actions to pass by way of Legacy under the notion of Goods, save when the bequeathing words are universal ; as, when the Testator saith, *I bequeath all my Goods* ; or, *I bequeath a fourth part of all my Goods* : (b) Alledging, That if the words be only general words ; as, when the Testator saith, [*I bequeath my Goods* :] In such Case, Actions, and Titles to Actions are not comprehended therein, because of the Pronoun [*My* :] And that by the general word [*Goods*] is comprized no more than the Testator hath in his actual Property *jure Domini*. It is certain, That if the Legacy of Goods in general be limited to any certain place ; as, when the Testator saith, [*I bequeath the Goods which I have in my House* :] In such Case Actions, because they are not circumscribable properly by this or that place, do not fall under that general notion of Goods : (c) Or if a man bequeath his Dutch Goods, the Bonds or Debts owing to the Testator in *Holland*, pass not by a Legacy under that notion, albeit the universal word [*All*] were added to it, (d) unless it were a Legacy given by a Merchant, who may rationally be presumed to have in *Holland* Debts only owing to him. (e)

2. Such as assert Actions and Rights of Action to fall under the general notion of Goods, do yet deny them to fall under the notion of Moveables or Immoveables ; for with much confidence it is affirmed, That by the *jus Commune* Action, and Right of Actions are not comprized in a Legacy of Moveables or Immoveables ; no, though the universal word [*All*] be added thereto ; no, though the note of Universality should be geminated in the words of the Legacy, as when the Testator saith, [*I bequeath to A. B. all my Goods Moveable and Immoveable wherein they shall be found* :] And this is held even by those who yet allow them to fall under the general notion of Goods. (f) But this is contradicted by other of the Learned, who hold, That where.

where the words of the Legacy are universal, in that Case, Actions and rights of Action are comprized within a Legacy of Moveables and Immoveables. *g*) Now then, to reconcile the difference between the dissenting D. D. in this point, the fairest opinion is, that they are comprized therein when the Testator gemmates the words of Universality, and abounds or super-abounds in his sense that way ; as when he says (*I give to A. B. all my Goods, moveable and immoveable, and of what kind soever, or wheresoever they shall be found ;*) or other words to such most universal import. *(b)*

3. All Corporal Moveables inanimate, which are only passive in their motion ; as Books, Armour, Plate, Household-stuff, and the like ; and all Animals moving or active in their motion, as Horses, Sheep, &c. fall under this general notion of Goods. *(i)* But what if the Testator in his Will saith, (*I give unto my Wife all my moveable Goods and Household stuff of my House ;*) Whether shall the Wife have any of the Moveables other than such are of or belonging to his House ? Some are of opinion, That these words (*Of his House,*) keep this general Legacy under a Restraint, and confine it to the moveable Goods only which are in, or of his House : Others (and they the most approved) hold the quite contrary, and say, That these words are set to enlarge the Legacy, and give the Legatary the greater latitude of right even to other of his Goods which are not in his House. *(k)* And whereas some raise a double Objection against it : 1. That where the *Genus* (as in this Case) doth precede, and the *Species* follow (the moveable Goods being the *Genus*, the Household-stuff the *Species*) there and in such Case, the former is limited and restrained by the latter. 2. That the Copulative (*And*) is here to be understood for (*That is :*) Both which Objections are fairly answered thus ; *viz.* The first Objection holds only where the *Genus* and *Species* are not diversified in quality, but quite otherwise where they are or may be (as in this Case) of a distinct nature and quality, for in such Case both shall pass by the Devise ; as when a man bequeaths nourishment and Phylick to his Son. And the other Objection is as weak as the former, because the Copulative (*And,*) when it comes between two such things, as whereof the one may be included in the other (as it may in this Case) is not to be understood for (*That is,*) as in the Objection. *(i)* Indeed, where a Testator doth add to a Devise of several things specifically named something in general, but limited to some certain place, in such Case that local Limitation will work a Restriction upon all, though otherwise never so generally or universally bequeathed ; as when he says, *I give unto my Wife all the Household-Furniture both Woollen and Linnen, and other Utensils of my House :* In this Case,

(g) Molinæ. ad Alex. lib. 6. consil. 67. & Dec. Conf. 237. & 639. & Jo. Philippi Resp. 64.

(h) Aug. Mathæac. l. 17. c. 17. nu. 16. de Legar.

(i) Peregr. arr. 3. nu. 43. de fidei commiss. & Dec. Conf. 653. & l. momentum de verb. sig. & Alii.

(k) Mant. 9. tit. 3. nu. 17. & Mathæus de Afflict. Decis. 106.

(l) Mathæus ibid

(m) Mantic, ubi Case he shall be presumed to intend her nothing of all this out of, or not belonging to the House. (m)
 Supra.

4. Whereas it is much controverted among the DD. (as appears by what was formerly said) whether Actions and right of Actions, may be comprized within the Notion of Moveables and Immoveables, albeit the note of Universality be added to the Legacy, yet it is here to be observed, that it is agreed on all hands, that in cases of necessity they are comprizable within a Legacy of Moveables and Immoveables; as when the Testator makes *A. B.* the universal Legatary of all his Moveables, and *C. D.* the like of all his Immoveables, and these two accordingly, and to the effects aforesaid, his Executors, and dies: In such Case, for the prevention of the Testators otherwise dying, partly Testate, and partly Intestate, they are admitted to be comprized as aforesaid. (n)

(n) Rebuff, ad l. moventium. de verb. Sign. & Ranchin. par. 4. Concl.

23. & 24. Grassl. §. legatum quest. 19. nu. 5.

(o) Tepar. tit. de Legat. in genere. cap. 4.

(p) L. Titius. de Atq. rer. dom. (q) L. 1. §. Si jufferim. de acquirend. possess.

(r) Rebuff. ad di. 9. l. moventium v. moven-
 a; de verb. Sign.

5. By what was formerly said it is apparent, That when a Testator doth bequeath his Moveables indefinitely, all his Moveables are therein comprehended, albeit at the end of the Bequest, he should thereunto add some particular thing specifically; as, when the Testator saith, *I bequeath all my moveable Goods whatever, and Household stuff of my House to A. B.* (o)

6. Among the Moveables are computed all such things as may easily, and without prejudice be removed from place to place; (p) otherwise they fall under the notion of Immoveables, (q) as all other things affixed to the House, or (as we say) fix'd to the Free-hold, or cannot well be removed without being damnified. (r) If one devise to *A. B.* all his Moveables: By this do pass all his personal Goods, both quick and dead, which are either active in their motion, as Horses, Sheep, and the like; or which are meerly passive in their motion, which cannot move, but may be moved, as Plate, Household-stuff, Corn in the Garners and Barns, or in the Sheaf, and the like: Also all Bonds and Specialties. And by a Devise of Immoveables do pass Leases, Rents, Grass, and the like; but not any of those things that do pass by a Devise of Moveables. Yet Debts will not pass by either of these Devises. (1) And if one bequeath all his Household-stuff, hereby will pass his Plate, Coaches, Tables, Vessels of Wood, Brass, Pewter, Earth, and the like; but not his Apparel, Books, Weapons, Artificers Tools, Cattel, Victuals, Corn, Plow-gear, and the like. (2) *Sed Q.* Whether under that notion of Household-stuff, will pass more Plate than was commonly in use about his House; or Coaches, in case the Testator were by Profession a Coach-maker, or one that for his livelihood kept Stage or Hackney Coaches. And by a Devise of all Utensils, it is agreed, That Plate and Jewels do not pass. (3)

(1) Agreed
 9. Car. C. B.

(2) Dyer 59.

(3) Dyer ibid.

7. An Office which a man hath for term of years, and may make sale thereof, is computed among the Immoveables; (f) yet it hath been adjudged, That a Registers-Office is compriz'd with in the Moveables. (t)

8. Doves belonging to a Dove-house, as voluble as they are naturally, yet are computed among the Immoveables legally, by reason of their Relation to the said place, until they are taken and kept under Confinement; and therefore till such Capture, they go to the *Heres Immobilium*, as the Civil Law files the Heir, and not to the Executor. (u) The like may be said of Fish in the Pond, which are there for multiplication, breed and increase, and not for present use only. (w) The Materials also of a House pull'd down only with a design and intent therewith to rebuild the same, are computed among the Immoveables: (x) Yea, a Ship, though she be never to swift a sailer, yet for all her haste is computed among the Immoveables. (y)

9. It is a Question much controverted, Whether Money, be it never so currant, be comprehended within a Legacy of Moveables: As if the Testator should say, (*I give thee all the moveable Goods in my House,*) and there be found at his Death 1000 £. in his Chest: If this were the Reader's Case, no doubt, but he would soon resolve it in the Affirmative, and rather than fail, prove it syllogistically: (Whatever is currant is moveable; but Money is currant, *Ergo*, &c.) But to be serious, for the better resolution of that doubt, distinction must be had between money hoarded up in a strong Chest, for the safe keeping and preservation thereof, that it may not be thence soon removed, and money found in a Chest, there put not for that end, but for common use and service, and for daily and ordinary expences. In the former Case it passeth not by a Devise of Moveables; in the latter it doth. (z) And if it be doubtful for which of these ends it was there reposed, the Presumption shall be for the later. (a) Which holds true, albeit the Testator should devise the Immoveables only indefinitely, or design this money only to be let out at Interest. There is a great quarrel among the D. D. (for this Engine of all mischief, is of a very Metalsome quality) Whether Money actually out at Interest, be within the notion of Moveables? some affirm, (b) others deny it, (c) comprizing it under the notion of Debts, which seems most rational: But money in Cash hath gain'd the more received opinion of its being comprehended within a Legacy of Moveables, albeit it happen to be much in quantity, (d) or designed for a Purchase, so as it be not for that end of a great quantity. But in such places where by com-

& 45. (c) Gail. Obs. l. 2. c. 11. nu. 7. (d) Theff. Decif. 160. Mobilibus Legatis, Legata Pecuniæ. l. Si chorus. Sect. 1. & l. si fundus ff. de Legat. 3. Dec. Conf. § 81. num. 4. Etiam Cambiis tradita. Pinel. l. 1. in 2. part. num. 44 de bon. Mater.

(e) Theſ. ibid. & Mant. lib. 9. tit. 3. & Menoch. de Arbitr. l. 2. c. 489.
 (f) Menoc. diſt. Praſ. 138. & Mant. l. 9. nu. 3. & Rench. Decif. par. 3. Concl. 280.
 (g) ibid.
 (h) Peregr. art. ſ. nu. 43. & Alex. lib. 6. Conſil. 68. & Mantio. ubi Supra. cum mult. aliis.
 (i) Jo. Eacquet. de Droit de Juſtice. cap. 21. numb. 81.
 (k) Gloſſ. in l. ſi Titius de Legat. 3. Pars pro toto by Fi-gurative Law. Pars pro Medictate by Laſt indeed.
 (l) ibidem.
 (m) Kitchin. verb. catalla. fol. 32.
 (n) Sect. & quia parum Auth de Nuptiis Rebuff. ubi ſupra. in L. Moventium. de verb. Sign. & Mantio. de Conſect. ult. vol. lib. 9. tit. 3. nu. 2. Decii Conſil. 381. & 472. (o) Sta. 21. H. 8 cap. 5. (p) Decif. Aven. 16. nu. 4. poſt. Paul. Caſtr. Conſ. quem Decius & alii ſequuntur.

mon uſage of Speech Houſhold-goods are mainly and frequently meant or intended by the word Moveables, or if it be ſuch Money as was only deſigned by way of Trade for Merchandize, the Teſtator being alſo a Merchant, and the quantity be great; or if the Teſtator bequeath all his Moveables in ſuch a Houſe, excepting none at all: In all ſuch Caſes, Money, how acceptable ſoever it otherwiſe be, yet is not admiſſible to any comprehension within a Legacy of Moveables; (e) Nor when any certain place is added to the Legacy, as if the Teſtator ſhould ſay, *I give my Houſe to A. B. with all the things therein, none excepted.* (f) Nor Money found hid in the Wall of a Houſe, albeit the Teſtator ſhould ſay, (*Be the Moveables of what kind or condition ſoever.*) (g)

10. And as for Debts, Bonds, and Obligations for Money owing, they are not within a Legacy of *Moveables*, be the place where they are added or not added to the Legacy, but make of themſelves, a third kind of Goods diſtinct from the former; (b) unleſs in ſuch places where Cuſtom prevails, that Obligations touching things moveable ſhall be computed among the Moveables, and touching things Immoveable bequeathed among the Immoveables. (i)

11. If the Teſtator ſaith, *I give part of my Goods to A. B.* he ſhall have the moiety thereof; for by ſaying a part, and not what part, the one half is regularly to be underſtood; (k) yea, though the Teſtator himſelf had but the one half of the thing bequeathed, yet the Legatary ſhall have a moiety of that half, and albeit the Teſtator ſhould ſay *a certain part.* (l) But if he ſaith, (*any part, or what part ſoever,*) then be it never ſo little, the Legatary muſt therewith be content, and the Executor is diſcharg'd.

12. Laſtly, whatever was formerly ſaid touching that litigious ſubject of Money, though by ſome formerly held as none of the Teſtators Goods and Chattels, (m) either moveable or immoveable, yet now the Law underſtands Money better, than to exclude it out of that notion, and the opinion is now as current as Money it ſelf, That it is part of the Moveable Goods of the deceased; (n) unleſs it be Money ariſing of the Sale of Lands, Tenements or Hereditaments appointed by the Teſtator in his Laſt-Will and Teſtament to be ſold, or Money coming of the profits of the ſaid Land for any time to be taken: This Money is indeed by the Statutes of this Realm excluded from being reputed as any of the Goods or Chattels of the perſon ſo deceased. (o)

13. Alſo by a Bequeſt of Moveables will paſs the Industrial Fruits of the ground, or ſuch as are there ſown by the Industry of man in expectation of a ſpeedy removal thence with increaſe: (p) But not the natural Fruits, or ſuch as grow of their own accord.

cord without any great labour or cost ; for these are not reputed ^(q) Decii Conf. Moveables, unless they were separated at the time of the Testa- ^{472.} tor's death. ^(q) Thus Trees and Grass, together with the Land ^(r) Perk. tit. Devise. & Ful- whereon they grow, descend to the Heir as parcel of the Freehold : beek. eod. tit. But the Corn growing thereon, belongs to the Executor as part of ^{fo. 37, 38.} the Testator's Goods and Chattels. ^(r)

14. Where one bequeaths all his Goods and Chattels, or all his Corn, or all of another thing : By such bequest doth pass not only all the Testator hath of that thing at the time of making his Testament, but also all he hath thereof at the time of his death ; and not only the all thereof which he hath in possession, but also what thereof he hath not in possession, but expectation. But if he limit this all to a certain place, or as to or in the occupation of some certain person, then no more will pass by such Bequest, than what he hath in such Place, or in the occupation of such a person at the time of making the Testament. ^(f)

^(f) Plow. 343

15. And therefore a man may bequeath by Will, not only those things which he hath at the time of making thereof, but also such things as he is to have, or may have afterwards : Thence he may bequeath the Corn that shall grow in such Ground the next year after his death, or the Wool or Lambs his Flock of Sheep shall yield the next year after his death : But in case there shall be no such Corn, Wool or Lambs the next year, then the Legacy proves fruitless. Yet if the Testator bequeaths twenty Quarters of Corn, or twenty Lambs, and doth Will that the same shall be paid out of the Corn that shall grow, or out of his Flock the next year, and there be no such Corn, or not so many Lambs the next year, yet the Devise is good, and must be paid. The reason of the difference is, because in the former Case there is such a Restriction and Limitation set to the Legacy as renders it questionable, whether it might ever become due or payable : In the latter there is only Demonstration how it shall be paid, and nothing of any such Restriction as calls the Legacy it self into Question : In the former there is a tacite Condition, in the latter the Legacy is absolute ; in the former there is but a meer possibility, in the latter there is a certainty : And though things only in Contingency, or in a Possibility, are devisable by Will, yet they are not grantable by any Assignment in case of a Possibility of Remainder : For a man possessed of a term of years, devised the profits thereof to one for Term of his Life, and after his decease to another for the residue of the years, and died : The first Devisee entred with assent of the Executors, and after he in Remainder, during the life of the first Devisee, assigned it to another, after the first Devisee died : And this Assignment was held void, for he had but a Possibility, which was not grantable. ⁽¹⁾

⁽¹⁾ Co. 4. 66.

CHAP. XXII.

Law-Cases touching Money bequeathed by the Testator.

1. **I**N the last precedent Chapter, it hath been examined how far Money may be comprized under the notion of Goods moveable or immoveable bequeathed: It follows now, that for the clearer Illustration of this desirable subject, we insert certain Cases in the Law touching the same: And because when Money is bequeathed, it often happens that a more than ordinary power is given to, or latitude left in the Executor by the Testator: It is requisite in the first place to see how far a Legacy of money left to the will of an Executor, is good or not; which cannot well be resolved without considering the several ways of disposal thereof; as thus, viz.

(a) Gloss. in §.
sic fidei com-
missum. l. Fidei
commissa. de
Leg. 3.

2. The Testator saith, (*I would have 10 l. given to A. B. if my Executors mind were not against it:*) In this Case, A. B. cannot have the 10 l. unless he can first obtain the Executors consent for it; because a Legacy in that manner given is tacitely conditional, and first requires the Executors Appobation even by the Testators mind and intention for the performance thereof: But if once the Executor gives his consent, he must then pay the 10 l. and cannot after recede from it to the prejudice of the Legatary. (a) Likewise, if the Testator saith, (*I give 10 l. to A. B. when my Executor will, or when my Executor pleases:*) In this Case, as in the former, the Legacy is not due till the Executors think fit, but must wait his pleasure, and be in a dilatory expectancy as long as he lives, or so long as he doth not say he will pay it: But if once he declare that he will pay it, and after dies before he doth pay it, his Executor is obliged to make it good: Contrariwise, if the Legatary die before the Testators Executor declares his consent to the payment thereof, for then it doth not accrew to the Legataries Executor, because it is conditional till the Executor declares his consent to pay it, and such a Condition to be performed at the pleasure of another, as that the Legacy cannot come to the Legataries Executor, before the Accomplishment thereof. (b)

(b) Gloss. ibid.

3. If the Testator saith, (*I give A. B. 10 l. if my Executor will:*) In that Case the Legacy is void, because there the Testator subordinates his Will to the Executors; makes his Executors Will absolute, and his own insignificant. But in case he saith after this manner; viz. (*If my Executor think fit, I give A. B. 10 l. or, If my Executor conceive it expedient, let A. B. have 10 l.*) In these

these Cases the Legacy is good, because here the Testator seems not to leave it wholly to the meer will and pleasure of his Executor, but as it were to the judgment of any honest or indifferent person, or (as the Law phrases it) *arbitrio boni viri*. The Law is the same, in case the Testator saith, [*If my Executor see cause for it, or it seem reasonable to him, Let A. B. have 10 l. or, I would have A. B. to be 10 l. the better for me.*] For although a Legacy cannot be left to the meer will and pleasure of the Executor, yet to his just and reasonable will it may; for so it is left more to Reason than to his Will.

4. But what if the Testator saith, [*I give 10 l. to A. B. if he shall deserve it of my Executor:*] In that Case the Legacy is due, in case the Legatary shall carry it no otherwise towards the Executor than as any honest man would or might do in the like case; or no otherwise than as any honest or indifferent person might or would be well satisfied therewith. Likewise if the Testator saith, [*I give A. B. 10 l. if he hath not offended my Executor:*] The Legacy is due, if it appears that A. B. hath behaved himself towards the Executor no otherwise than what would satisfy any reasonable and impartial man. In a word, when it is left wholly to the meer free and arbitrary will and pleasure of the Executor, the Legacy is void; but when it is left to his Will, only as it shall seem meet, just, and equal to him, it is good; for if in it self it be just and equal, the Executor may not interpret it otherwise. (c)

5. If a man devise all his Lands to A. B. and his Heirs, excepting Twenty pounds for ten years, which he willeth shall be employ'd for his Children: This is a good Devise of the sum of Twenty pounds a year for ten years. (d) Or if one having Leases for years, devise them to his Son, whom he makes his Executor, except the sum of Five hundred pounds to be paid out of the Leases to his Daughters for Portions: This shall be a good Legacy to the Daughters wherewith the Leases are chargeable. (1) Or (1) *Solus*. 1. if one bequeath 20 l. to the Children of A. B. who then hath three Children more or less at the time of making such Bequest; and after, but before the Testators death, he happen to have other Children: In this Case, those other Children he hath afterwards shall have no part of the said Legacy, but the Children born at the time of making the Testament shall have it all. The reason is, because in this Case it is presumed the Testators intention did not extend to any not *in rerum Natura*, when there were Children indeed, and at the same time in being.

6. The Testator saith, [*I give 100 l. to my four Neighbours A. B. C. and D. provided they bestow 10 l. in a Tomb-stone, to be set on a Grave:*] Altho B. should refuse to joyn with the rest therein,

(c) Gloss. ibid.
lit. o. verb. arbitrium.

(d) Trin. 2. Jac. in B. R.

(1) *Solus*. 1.

(c) Bart. in l. si therein, yet *A.C.* and *D.* shall have not only their respective portions of the 100 *l.* but also that part that should have come to *B.* in case he had performed the Condition. Or, if he say, [I give 100 *l.* to *A.* and such of my three Children as shall come to my Funeral,] and dies; neither of his Children are at his Funeral: In this Case *A.* shall have the whole 100 *l.* because the Legacy is in the Conjunctive; were it in the Disjunctive he could have but 50 *l.* (e)

7. Suppose the Testator saith, I give 50 *l.* to *A. B.* and more than that 100 *l.* to *C. D.* In this Case *C. D.* shall have an entire 100 *l.* but no more. (f) Possibly the transposition of the words may alter the Case, and make the Legacy worth 150 *l.* to *C. D.* As if he should say, [I give to *A. B.* 50 *l.* and 100 *l.* more than that to *C. D.*] But suppose he should say, I give 100 *l.* to *C. D.* more than I have given to *A. B.*] when indeed he had given nothing at all to *A. B.* In that case the Legacy of 100 *l.* is good to *C. D.* notwithstanding that false Implication to *A. B.* (g)

8. *A. B.* makes *C. D.* his Executor, gives in his Will 1000 *l.* to *J. G.* and therein says, I desire that *J. G.* will pay the said 1000 *l.* to the College of *W.* and dies. After the said College is dissolved, and before *J. G.* had received the said 1000 *l.* from the Executor of *A. B.* The Question is, Whether *J. G.* shall now recover the 1000 *l.* from the said Executor (the College to whom he was to pay it being now dissolved?) or, Whether it shall remain in the Executor? It is resolved, that in case there was no fault in *J. G.* why the 1000 *l.* was not paid to the College before its dissolution, and the payment prevented for no other reason, but because of the said dissolution, *J. G.* shall in such case recover the 1000 *l.* from the said Executor. (h)

9. If a Testator bequeath 100 *l.* to *A. B.* and *C. D.* And after one of them appears incapable of taking by the Legacy, the other shall have only 50 *l.* and not the whole 100 *l.* (i) Yet there are, and they of the most Learned, who hold, That if one of the Legataries be incapable, his proportion of the Legacy shall accrue to his Collegatary, (k) as is evident by the former Case of the Tomb-stone; and never fails, where the Legacy is in the Conjunctive, by the Law of Accretion or *jure Accrescendi.*

10. *A. B.* pawned a Jewel with *C. D.* for 100 *l.* then in this Will makes his Son his Executor, and orders that *C. D.* should sell the Jewel, and out of the Proceed thereof pay himself 100 *l.* and restore the overplus of the value to his Daughter. Whether may the Daughter compel *C. D.* to sell the Jewel, and restore her the overplus? It is held in the Negative. But she may compel her Brother, who is her Fathers Executor, to commence his Action at Law against *C. D.* in order to the premises. (l) Or if the

(c) Bart. in l. si
tibi & ei de Le-
gar. 3. & glof
in di. l. & C.
de Cad. toll. l.
unica. §. ubi
autem. & §. si
non Conditio
uni Conjuncto-
rum infecta, in
ejus persona de-
ficiens, non mi-
nuit Legatum
alterius, imo
auctur per jus
accrescendi.
(t) Glof. in l.
Si servus Lega-
tus §. Si ita
scriptum. de
Legatis 3.
(g) Glof. ibid.

(h) Glof. in l.
pater filium. §
fidei commissit
de Leg. 3.
(i) L. Si Titio.
de Legat. 2. &
Glof. ibid.
(k) Glof. min.
in l. qui duos
reos. de Leg. 2.
& Bald. in l.
eum quam in
no. C. de Fidei
commissis.

(l) L. Si servus
legatus §. qui
Margarita. &
Glof. ibid. de
Legat. 3.

the Testator say, I will that *C. D.* receive 100 *l.* and restore the Jewel to my Daughter (not expressing of whom he shall receive the 100 *l.*) In that Case the Executor is liable for 100 *l.* (m) (m) Gloss ibid.

11. Suppose a Testator in his Will saith, *Whoever shall be my Executor for the Goods and Chattels I have in Ireland, shall give 10 l. to A. B. in Dublin*; the Testator makes three Executors for his said Estate in *Ireland*, and dies. The Question is, Whether every of these Co-executors (each of them having Administer'd to the said Irish Estate, and each of them having a part thereof in his possession) is obliged to pay 10 *l.* to *A. B.*? and, Whether that universal word in the Legacy, [*Whoever*] hath that force in it as to make each of them obliged in the Case for 10 *l.* each. It is resolved *A. B.* shall have but 10 *l.* in all to be paid by, from, and among all the three Executors. (n). The reason is evident, because they all make but one Representative, being distinct rather in their persons, than in their Office. (n) L. si quis in fund. Gloss. ib. de Legat. 1.

12. A Testator having made *A. B.* and *C. D.* his Executors, in his Will saith, That either *A. B.* shall pay 10 *l.* to *J. G.* in lieu of a Legacy, or *C. D.* alone shall be his Executor, and dies. They both Administer: In this Case *J. G.* may sue both of them for the whole Legacy, and *C. D.* is as far forth liable to the payment thereof as *A. B.* (o)

13. A Testator, whose Wife is big with Child, saith, *I will, That if there be any Daughter born to me, my Executor shall pay her 100 l. and dies.* After the Wife is delivered of Twins, viz. Two Daughters. In this Case, the Executor shall pay 100 *l.* to each, unless it appear the Testator intended the contrary. (p) In like manner if a man bequeaths 1000 *l.* to his Daughters (without other words) and dies, and his Wife after his death be within due time delivered of another Daughter, that Posthume Daughter shall claim proportionably with the others in the 1000 *l.* if the Testator by his Will made no other provision for her. (q) (p) Gloss. in l. filius. de Legat. 1. (q) Dist. 1. si.

14. A Testator bequeaths in this manner, viz. I give to *A. B.* 300 *l.* and I will that my Executors do pay 100 *l.* thereof out of the arrears of Rent due to me out of such Lands, naming them, the other 200 *l.* out of such and such Goods to be sold: After the Testator receives in his life-time the said arrears of Rent, and converts them to other uses, and dies without altering his Will: In this Case *A. B.* shall notwithstanding have the whole 300 *l.* The Reasons in Law are, 1. Because it was no Condition, but only a Demonstration that had relation to the Legacy bequeathed. 2. Because a bare Designation how or whence a Legacy may be paid, set after a Legacy given, makes it not conditional. (r) (r) L. quidam. & Gloss. ibid. de Legat. 1. & Bar. tol. in dict. L.

(i) L. quidam
& gloss. itid.
de Legat. 2.

15. Suppose a Testator saith, I bequeath some money for the repairing of my Parish Church (not expressing how much:) In this Case the Legacy in favour of pious Uses, is good, though it be somewhat uncertain: And his Executor shall expend so much money as will suffice for repairing thereof, unless it require a vast sum, at least much too great for the Testators Estate conveniently to bear: In which Case it shall be presumed the Testator intended no more than his Estate would conveniently admit; and the Ordinary in such Case shall moderate the sum, with respect had to the Testators Estate. (f) For if we have a retrospect to Antiquity, we shall ever find it a Custom, that the Goods and Revenues given to Churches, have in all Ages, where the Christian Faith was professed, been acknowledged to belong of right to the Bishops disposing for the use of the Church. Some authority we have for this from the Synod at *Antioch*, Can. 24 & 25. where note (saith *Balsamon* upon the 25 Canon) "Ὅτι διὰ ἐκκλησιαστικῶν ὀφείλῃσι πάντα τὰ τῶν ἐκκλησιῶν διοικεῖσθαι, that the Administration of those things which appertain to the Church, belongeth to Ecclesiastical men. To the same purpose are the seventh and eighth Canons of the Council held at *Gangra*, Εἰ τις κερπορείας ἐκκλησιαστικὰς, &c. And, Εἰ τις διδοῖ ἢ λαμβάνει κερπορείαν, &c. Where a Curse is past upon all those who presume to give or receive the Church Fruits, otherwise than by the Bishops Dispensation, or theirs, who by the Bishop shall be thereunto appointed. And in the Year 589. by the ninth Canon in the *Toletan* Council, *Ecclesiæ cum suis Rebus ad Episcopos pertinent*. Likewise *Cyril* of *Alexandria*, in his Epistle to *Domnus*, saith, That the Diocesan for the time being, may διατεῖσθαι, that is (saith *Balsamon*) ἀντὶ τοῦ κατὰ δόξους ἐμπνεύεσθαι, that he may confidently and securely be concredited with the Churches Revenues. And hence probably it is that the Bishop was sometimes present at the making of the last Wills and Testaments of such Benefactors: As appears by the Will which *Bertricke* made, a Kentish Gentleman of *Mepham*, related by *Lambert* out of the Antiquities of that place; and I give (saith the Testator) ten Hides at *Streiton* to the Minister at *Walkenstede*; and the Land at *Falcham* after *Bytware*s days to St. *Andrews* for *Alfries* Soul, their Lord and his Elders: So their Will was, &c. This is said to be done, witness *Edgive* the Lady, and *Ode* the Archbishop, &c. *Alfsie* Priest of *Croyden*.

16. A man possessed of Goods and Chattels in *England* and *Ireland*, makes his Last-Will and Testament, and therein his Son, a Minor, his sole Executor, and *A. B.* his Guardian, and the Overseer of his said Will, to whom he therein bequeaths 100 *l.* and dies. *A. B.* willing to have himself excused from the said Guardian-

Guardianship in part, refuses it as to the Estate in *Ireland*: In this Case, he shall lose the whole Legacy of 100*l.* because the Law is, That a Legatary refusing the Office or Duty imposed on him by the Will, though but in part, forfeits his Legacy in the whole. (t)

17. A Testator makes his Last-Will and Testament, and therein appoints *A. B.* and *C. D.* his Executors; and after doth annex a Codicil to his Will, and therein saith, I will that *A. B.* one of my Executors shall give *J. G.* 10*l.* when I shall have given him the said *A. B.* 100*l.* and dies, without bequeathing him any such 100*l.* the Questions are, VVhether *A. B.* by reason of such words spoken by the Testator, may have right to that 100*l.*? and, VVhether he be obliged to pay 10*l.* to *J. G.*? They are both answered in the Negative. (u) The reason in Law is, because words meerly Enunciative, relating to something that should be done in time past or to come, without expressing the very thing it self, signify nothing as to a sufficient disposal of any thing, which is not deduceable from any such bare Enunciations. (w)

18. If the Testator saith, I give thee 100*l.* when thou shalt marry, and thou art married at that time when the Testator so made his Testament, and demandest the 100*l.* upon the Testators death: In this Case thou shalt have the 100*l.* if the Testator at the giving thereof were ignorant of thy then being married. But if he then knew thereof, thou shalt not have it till thou art married a second time. (x)

19. If in two several and distinct VVritings or Instruments, bearing one and the same date, the same Last Will and Testament be found written *verbum*, save that in the one there is mention made of a lesser Legacy to one, than there is to him in the other; the lesser only is due: As thus, *A. B.* going beyond Sea, makes his Last-Will and Testament, the Tenor of which VVill is exemplified or duplicated in two distinct Papers, as if the one was only a Duplicate of the other; only in the one of these is found a Legacy of 100*l.* to *C. D.* But in the other a Legacy only of 50*l.* to him; whereof the Testator take one with him to Sea, the other he leaves at home behind him. In this Case *C. D.* ought not to have more than one of these Legacies, and that the lesser also, *viz.* That of the 50*l.* only. (y)

20. A Testator being possessed of 800*l.* value in Goods, appoints *A. B.* and *C. D.* his Executors, and bequeaths 400*l.* to *A. B.* and after says, Whoever shall be my Executor, shall pay 200*l.* to *J. G.* and gives several other Legacies to the full value of his 800*l.* Estate, and dies. *C. D.* refuses the Executorship: In this Case *A. B.* is obliged to pay full 600*l.* to the Legataries,

(t) L. etiam si
de Legat. 1. &
Gloss. ibid. &
Bart. in dict. L.

(u) Gloss. in L.
Titia. de Leg. 2.

(w) Bart. in
dict. L.

(x) L. si ita
Sect. II parer. &
Gloss. ib. de Legat. 2.

(y) L. Sempro-
nius & Gloss.
ib. de Legat. 2.

(z) *L. Si Titio*. though 400 *l.* of the 800 *l.* were first given to himself. (z) Which differs from the Law as now practised, That after Debts paid, a Legatary-Executor may first satisfy himself.

& gloss. *ibid.*
de Legat. 2.

21. Any words, though in themselves of a defective signification, yet if such as whence the Testators mind or meaning is rationally deduceable and consequently Colligible, are sufficient to uphold a Legacy; and therefore if a Testator willing to bequeath 100 *l.* to *A. B.* doth but say in his Last-Will and Testament, *I desire that A. B. would be contented with 100 l. or, That A. B. would be satisfied with 100 l.* or the like, it is a good Legacy to him of 100 *l.* (a)

(a) *L. Pero*
Luci. & gloss.
ibid. de Le.
326. 2.

22. An imperfect Speech by the Testator, which in it self leaves the sense incompleat, either spoken or written by the Testator in his Last-Will and Testament, is legally deduceable to a good Construction for the upholding of a Legacy, if the words precedent or subsequent hold good Congruity therewith; as thus, A man in his Last Will and Testament *inter alia* says, [To my Son *William* 100 *l.*] In the words precedent he had said, [I leave my Dwelling-house to my Daughter *Anne*:] or in the words subsequent he says, [I give 10 *l.* to my Brother *George*:] In such Case, albeit the words, [I Bequeath, or I give, or I Leave] or the like be omitted in that imperfect Speech relating to his Son *William*; yet in regard they are joyned with the words precedent or subsequent, it shall in construction of Law be understood, as if they were joyned also with the words relating to his Son *William*, by reason of its Congruity therewith, and thereby making the sense perfect. Otherwise if it were incongruous; as suppose the Testator had said, (That my Son *William* 100 *l.* or from my Son *William* 100 *l.*) And in the words precedent or subsequent he had said as formerly: In such Case, there would be no Congruity with the last said imperfect Speech relating to his Son *William*, nor can they be joyned thereto without plain Incongruity; and therefore in that Case, the Rule aforesaid would not hold. (b)

(b) *L. cum pa-*
ter g'oss. in §.
22. cum im-
perfecta. de
Leg. 2.

23. A Testator makes three Executors, and appoints one of them by name to take care of his Funeral; for which purpose he doth order him to receive 100 *l.* beforehand. The Testator being dead, he receives the 100 *l.* of his Co-executors, but doth not disburse above 60 *l.* about the Funeral. The Question is, Whether he shall retain the other 40 *l.* to his own use? The answer is Negative; for that it belongs to all the Executors alike. (c)

(c) *L. Lucius*
Titius. §. A te
pero, & gloss.
ibid. de Le.
327. 2.

24. If a sum of Money be bequeathed to certain persons, on condition of something to be performed, the failure of one of them shall not prejudice the Legacy of another; as thus, *viz.* The Testator makes his three Sons his Executors, and in his Will

saieth,

faith, (*I give to my Neighbour A. B. 100 l. and to such of my Sons as shall come to my Funeral,*) and dies. Neither of his Sons are at his Funeral. The Question is, Whether A. B. shall have the whole 100 l? It is answered in the Affirmative, and that there (d) C. de Cad. is nothing in this Case to diminish any part of the Legacy to A. B. *tol. l. unica §.* (d) But if the words had been, (*I give to A. B. and such of my Sons as come to my Funeral 100 l.*) in that Case, A. B. should have only 50 l. The reason of the difference is evident; for in the former Case the Legacy is given Dis-junctively, but not so in the latter; as has been formerly stated and resolved. *ubi autem. & §. si vero non omnes. l. si tibi & ei. Et gloss. ib. de Legat. 3.*

25. Suppose a Testator in his Will faith, (*I give 10 l. to A. B. and if he chance to lose it, I give him 10 l. more:*) In this short Case, are three points: 1. Whether the second Legacy be good? 2. Whether the Executor may require caution of the Legatary, that he shall so secure the first 10 l. that he may not be liable to pay him a second 10 l. 3. Whether in Case A. B. lose the 10 l. twice, or thrice, or oftner, the Executor be still obliged to pay him 10 l. more. The first of these points hath its solution by answering the second and third. Now the Law doth not warrant the Executor to require such caution in this Case from the Legatary; to whom, if he should pay the 10 l. more than once, the Executor is not obliged to pay a third 10 l. which resolves the first point in the Affirmative. (e)

26. A man dying Intestate, A. B. pretended as if he would take out Letters of Administration of his Goods: The Intestate died indebted 100 l. to C. D. so that A. B. might legally have been sued for it, if he had Administred to the Intestates Goods, as he pretended he would. C. D. makes his Will, and therein makes J. G. his Executor, and gives 100 l. to the said A. B. saying withal, that his Executor might easily satisfy that 100 l. to the said A. B. for that he the said A. B. owed him the said C. D. the Testator 100 l. by reason of his Administration to the said Intestate. C. D. dies. After A. B. would not Administer to the said Intestates Estate, as he pretended, but demanded the 100 l. Legacy given him by C. D. The Question is, Whether he ought to have it? It is resolved in the Negative, because it seems to contradict the main intention of C. D. the Testator, who gave him that 100 l. as real Administrator to the said Intestate, who owed C. D. 100 l. But after appearing no other than a Pretender to the said Administration, the Law for the reason aforesaid, excludes him from being a real Legatary to the said 100 l. (f) *(e) Fidei commissi. § si quis decem. & gloss. mag. & min ib.* *(f) Dis. l. si fide commissi. Sect. item de Legat. 3.*

27. A Testator faith in his Will, That his Executor shall give his Lands situate in S. to A. B. and to C. D. more than this 10 l. The Question is, of what import the words, (*more than this*) are in the Legacy of 10 l. to C. D? It is held, That by reason of the

(g) L. si Sic lo- words, C. D. shall have the whole 10 l. and one moiety of the
cutus. & gloss said Lands devised in manner aforesaid. (g)
ibid. de Leg. 3.

28. A Legacy of 100 l. is given to A. B. on this Condition, that he buy such a House of C. D. which is worth 50 l. and give it to J. G. The Legatary A. B. offers 50 l. for the House to C. D. He will not sell it him under 100 l. Q. Whether A. B. is obliged to give the 100 l. for the House, that so he may deliver it to J. G. according to the Testators will and meaning? It is resolved in the Negative: But he shall give the Testators value and estimate thereof, viz. 50 l. to J. G. (b)

(h) Gloss. in l.
non dubium. de
Legar. 3.

29. Suppose the Testator give thee 100 l. that wherewith thou mayest do something for a third person, specifying the person and the thing which the Testator would have done. Thou demandest the 100 l. of the Executor; he refuseth to pay it thee, unless thou give Security to do therewith what the Testator required. The refusal of payment by the Executor is good; thou shalt not have the 100 l. till thou give good Security to do therewith, as by the Testator is enjoyned. (i) And in some Cases an Executor may require Security from the Legatary; So in other Cases, Security may be required from an Executor for a Legacy: As in *Spencer's Case*; S. being committed to Prison in *London*, was return'd on a *Habeas corpus cum causa*, which was, That there is a Custom in *London*, That if a Freeman devise a Legacy to an Orphan, the Executor shall be enforced to find sufficient Sureties to pay the Legacy according to Law: And shew'd, That a Woman gave a Legacy to such an Orphan, and return'd the Will; whereby it appeared, that she was a Widow, Inhabitant in *Middlesex*, but Free of *London*, and made the said S. Executor, and devised a Legacy to the said Orphan; but before the Orphan came of full age, the Executor was to have the use of the money; and also the Legacy was conditional, That the Orphan marry with the Executors assent; and return'd further, That for his refusal to find Sureties according to the Custom aforesaid, he had been committed. *Whitlock* pray'd his being set at liberty, for that the Custom is contrary to Law, because that thereby he ought to find Sureties to pay a Legacy, where possibly he may not have Assets, after Debts paid, when the time of payment shall come: Also it is contrary to the Will of the party; for she would not have the Orphan to have it, but on Condition, that she marry not without the Executors assent. *Curia*, The Return is, that he was required to find Sureties according to Law, so as regard be had to Assets, and the Condition, and the Will of the party. And *Coke* said, That if they had press'd him to any other Obligation than such as consisted with Law, and the Will of the party, we should afford relief. *Whitlock*, They have not pursued the Custom al-
ledged;

(i) L. si tibi Le-
garum & gloss.
ibid. de Leg. 3.

ledged : For the Custom is, That he ought to be a *Freeman*, and the Devisor was a *Freewoman*, and also Inhabitant out of *London*. *Coke* and *Dod*. It is good Affs, for *Homo* includes both Sexes. *Dod*. In the Case of Prifage, a *Freewoman* is without the Charter. *Coke*, So it is for an Apprentice in *London*. *Coke*, *Dod*. If ſhe were an Inhabitant in *Bristol*, it were not material ; for notwithstanding that ſhe may be free : And a *Procedendo* (i) *Hill*, 13 Jac. B. R. *Spencer's* *caſe*. in *Roll. Rep.*

30. Suppose a Teſtator gives 500*l.* to one, 400*l.* to another, and 300*l.* to a third. And after ſaith in his Will, That *A. B.* ſhall have as much as one of the Legataries. The Queſtion is, What *A. B.* ſhall have ? Some have ſuppoſed that he ought to have 500*l.* becauſe in the greater, the leſſer is included : But the Law, which prevails in ſuch caſe, is otherwiſe ; he ſhall have only 300*l.* and no more, becauſe the Executor being burthened with ſuch Legacies, ought to have it in his power to give which proportion he thinks fit ; and becauſe it is a Rule in Law, That in all doubtful Caſes relating to the quantity of a Legacy, the leaſt is to be underſtood. (k) *L. qui con-*
cubinam, §. cum
ita legatum, &
gloſſ. ib. de
Legat. 3.

31. *A. B.* makes his Laſt Will and Teſtament, wherein he diſinherits his Son, and makes a ſtranger his ſole Executor, gives divers Legacies ; and after in his Will ſays, That in caſe his Will ſhould hereafter happen by any means to be ſo invalidated as to be pronounced judicially *null* and void, that thereby he ſhould happen to die Inteſtate, that then however his full purpoſe, mind and reſolution is, That from ſuch Adminiſtrator *ab Inteſtato* (whoever it ſhould happen to be) ſhall be given 100*l.* to *C.* and 200*l.* to *D.* and dies. After his ſaid Son doth commence his Action, and gets Judgment againſt the Will, which is judicially pronounced *null* and void ; the Son obtains Letters of Adminiſtration of his Father's Eſtate *ab Inteſtato*. The Queſtion is, Whether the Son be obliged to pay the Legacies left by his now Inteſtate Father ? It is reſolved in the Negative ; for that not any thing now is valid (in ſuch caſe) which related to his Fathers mind or meaning in the ſaid pretended Will as aforeſaid. (l) *L. nec Fidei*
commiſſa, &
gloſſ. ibid. de
Legat. 3.

32. To conclude, A Teſtator writ his Teſtament with his own hand, and therein ſaid, That in regard he had found *A. B.* a very faithful Servant to him, and that he had done him many eminent Services, he deſired to leave him, not by way of a Legacy, but by way of Gratiuity, 100*l.* which he would have his Executor to pay him as a reward of his good Services. Now in truth *A. B.* was ſuch a perſon, as by Law was incapable of taking by a Devife. The Queſtion is, Whether *A. B.* may demand the 100*l.* not as a Legacy, but as a reward for his Services aforeſaid ? It is held in the Negative ; becauſe it will be preſumed it was left him

(m) Cum quis
§. fin. & gloss.
ib. de Legat. 3.
(n) Gloss. min.
ibid.
Hill 26 Eliz.B.
R. Lady Lodges
Case Leon.

in that manner *in fraudem Legis*, on purpose to defraud the Law, which rendred him, by reason of some legal Impediments, incapable of taking by a Testament: And for that a Testators Testamentary Confession of his being obliged, or, in debt to a person in himself incapable, hath no operation in the Law, (m) other than to raise the Presumption so much the stronger, that it was made only *in fraudem Legis*, specially when such Confession is voluntarily made in favour of a person incapable. (n)

The Lady *Laxton* by her Will bequeathed to *M. L.* and *A. L.* several Legacies in Monies to be paid to them respectively at their several ages, &c. and made her Daughter the Lady *Lodge* her Executrix, and died. *A. L.* died before his full age, *M. L.* took Letters of Administration of the Goods of *A. L.* and sued the Lady *Lodge* in the Spiritual Court for the Legacy bequeathed to *A. L.* Before which Suit begins, the Lady *Lodge*, with Sir *Tho.* her Husband, gave to *W. C.* all the Goods which she had as Executrix to the said *Laxton*, depending which Suit, the Lady *Lodge* died: After which, Sentence was given against her being dead: And now a Citation went out of the Spiritual Court against him: Executor of the said Lady *Lodge*, to shew cause why the Sentence given against her should not be put in execution against *W. L.* And Sentence was given against the said *W. L.* who appealed to the Delegates, and there the Sentence was affirmed. And now the said *W. L.* sets forth in the King's-Bench the Grant of the said Lady *Lodge* as aforesaid, and that the same was not examinable in the Spiritual Court, and thereupon prayed a Prohibition. And *Aubery*, Doctor of the Civil Law, came into Court, to inform the Justices, That by their Law, if the Defendant died before *Litis contestationem*, or Issue joyned, the Suit shall cease; but if after, then otherwise, for in such Case the Suit shall proceed; for after *Litis contestationem*, the right of the Suit is so vested in the Proctor, that he is a person suable until the end of the Suit: Also, That if a Legacy be bequeathed to an Infant, to be paid when he shall come to the age of 21 years, if such a Legatary dieth before he come to that age, yet his Executor or Administrator may by that Law sue for the said Legacy presently, and shall not expect until the time, in which if the Infant had continued in life, he had attained his full age. And as to the Prohibition, it was argued by *Egerton* Solicitor-General, That the Grant aforesaid is not triable in the Spiritual Court: As if the said Lady *Lodge* had suffered a Recovery to be had against her as Executrix by *Covin*, &c. the same is not examinable in the Spiritual Court, but belongs to Temporal Conusans, and therefore he prayed a Prohibition: But on the other side it was said, That if the Prohibition be allowed, the Legatary shall have no remedy: But that was denied,

nied, for the party might sue in Chancery : And after the Prohibition granted, the Court awarded a special Consultation, *quatenus non extendat ultra manus Executoris*, & *quatenus non agitur de validitate facti*, viz. the Grant aforesaid.

C H A P. XXII.

Of Legacies relating to Debts, with certain Cases in the Law touching the same.

1. **T**HINGS in Action, as Debts, are devisable by Will ; therefore if the Testator bequeath any Debt due to him on an Obligation, or a Contract, or the like, the Bequest is good ; for Obligations, as also Counterpanes of Leases and the like, may be devised, only the Legatary cannot sue upon the Obligation in his own name, nor enter for the Condition broken upon the Lease, if there be cause ; but he may cancel, give, sell or deliver up the Obligation to the Obligor, or surrender the Counterpane to the Lessee. (a) And it is an infallible Rule, That whatsoever (a) *Perk. Sect.* may come to the Executor after the Testators death in respect of his Executorship, may be devised by the Last-Will and Testament of the Testator. Therefore a Testator may bequeath a Debt due to him, and if he doth not make the Legatary his Executor as to that Debt, and he who is his Executor, shall refuse to sue the Debtor, that so the Legatary may receive it, in this Case the Legatary may compel the Executor either to recover himself, and so to pay it to the Legatary, or to give him power to sue for, and recover it himself in the Executor's name : And this the Legatary may compel the Executor unto by convening him before the Ordinary, and on pain of Ecclesiastical Censures to make him a Letter of Attorney for recovery of the Debt to him bequeathed, in the Executor's name, in case the Executor himself doth not sue for it for the Legataries use, who cannot otherwise sue the Debtor, because he doth not represent the Testator's person. But if it be such a Cause of Action as is altogether uncertain ; as, where a man hath an Action against another for taking away his Goods, or for some Trespas done the Testator in his life-time, or to compel another to make an Accompt, or the like ; such Causes of Action are not devisable. But such things in Action, as Debts owing to the Testator, and the like, are devisable by Will, and therefore if a Testator bequeath a Debt to A. which one owes him, and another Debt to B. as Legacies, though they be things in Action, yet if there be Assets

to pay the Testators Debts, the Legatee may, in the Executors name, sue for the Debt, recover it, and retain it as his Legacy. And when such Debts are recovered in the Executors name, the Legatees may compel the Executors to deliver such Legacies bequeathed unto them, by Suit in the Ecclesiastical Court against them. (I)

(1) 48 Ed. 4.
14. Fitz Con-
dit. 9.

2. Now the Law takes notice but of four ways, within the Circumference whereof all Legacies relating to Debts do fall: As, 1. When the Creditor bequeaths to one what his Debtor owes him: Or, 2. When he bequeaths it to the Debtor himself: Or, 3. When the Debtor bequeaths to the Creditor; Or, 4. When a third person bequeaths to a Creditor what his Debtor owes. Suppose therefore that a Creditor *sh* *uld bequeath to one what A. B. owes him*, without expressing either the thing or the quantity: In this Case he seems to bequeath his right of Action, nothing else: So that the Testators Executor is no way obliged to such Legatary further than to deliver him the Obligation or Bond, and yield his name (if need be) to the Action. (b) Yea, though the quantity were expressed by the Testator, yet the Executor is not bound to pay it to the Legatary, if the Testator joyn'd the very person of the Debtor himself, with the execution or payment of the Legacy; as if he should say, (*I would have A. B. receive the 100 l. of C. D. which he owes me*;) yet even in that Case, if the 100 l. cannot be recovered without Law, it shall be at the Executors, not the Legataries cost, and at the Legataries, not the Executors peril. (c)

(i) L. si sic. §.
si mihi. ff. de
Legat. 1.

(c) Papon. in
rit. de legat.
Tritic. vers.
Toures fois, &c. in divers respects:
and in Auchen-
Nunc si Liti-
gios & dict. L.
si sic. §. ult.

3. Every Bond or Obligation is both Active and Passive, but in divers respects: Active in respect of the Creditor; Passive, in respect of the Debtor; Active when the Creditor bequeaths to a third person what his Debtor doth owe him; Passive, when the Debtor bequeaths to his Creditor what himself owes to the other. Between which two the difference is great; for when the Creditor bequeaths, he bequeaths either to the Debtor himself, or to some other person: In both which Cases, a right is bequeathed, but with this difference, in the former, a Bond or Obligation is bequeathed, in the other a Discharge or Release.

4. And when a Creditor bequeaths a Debt, it is not always material to insert any certain Sum of money in the Legacy of that Debt; for suppose the Testator says (*I bequeath the 10 l. which A. B. owes me*) be it to A. B. himself, or any other: In that Case, a right, rather than a certain Sum, is understood to be given; because if A. B. owed the Testator nothing, then nothing is bequeathed, and so the Legacy is fruitless. (d)

(d) L. si sic. Sc&c.
si mihi. Sect.
ff. ff. de Leg. 1.

5. But now on the other hand, when a Debtor bequeaths what he owes, and the Legacy be given to the Creditor himself: In that

that Case, it is very material to see, whether any certain sum be express'd in the Legacy or not; for if there be, as when a Debtor-Testator saith, (*I bequeath to A. B. 10 l. which I owe him:*) In that Case not so much a bare right only, as a certain sum of money seems to be bequeathed to him: for which reason a Legacy of 10 l. will be good to *A. B.* albeit the Testator owed him nothing. (e)

(c) L. leg. vi. in fin. ff. de Li. berat. Legat. & l. 2. C. de fals. caus.

6. But if there were no certain sum express'd by the Debtor-Testator; as, if he had only said, (*I bequeath to A. B. what I owe him:*) It is a fruitless Legacy, if he owed him nothing. (f) In like manner, if a Testator saith, (*I give my Wife what I had with her in Marriage, or her Marriage-Portion*): If he had nothing with her in Marriage, the Legacy signifies nothing; yet if he had said, (*I give my Wife 100 l. which I had with her in Marriage, or for her Marriage Portion,*) though in truth he had nothing with her, the Legacy shall be good, and is worth 100 l. (g) Or having had 100 l. with her, shall in his Will say (*I give my Wife 200 l. which I had with her in Marriage,*) the Legacy is good for 200 l. yea, though he should therein refer himself to the Articles of Marriage; and add, (*as is contained in certain Covenants of Marriage made between us:*) The Reason is, because the Law more considers the thing it self, when *in terminis* express'd in a Legacy, than any false Demonstration thereof. (h) Unless it can be sufficiently proved, That the Testator meant otherwise than he spake, or that he err'd in supposing that to be true which was not so: In which Case, the Legacy avails nothing, albeit a certain sum were *in terminis* express'd by him. (i)

(f) §. Sed si uxori. Inst. de Leg.

(g) Inst. ibid.

(h) L. 3. c. de fals. caus. & l. 1. in fin. C. de Dot. prælegat.

(i) L. 1. C. de fals. caus.

7. For which Reason the Legacy is not good in such Case. unless he certainly knew he owed nothing to the Legatary; otherwise it is, if he supposed he did, when indeed he did not. (k) And the Reason why a Legacy given by a Creditor, is nothing worth, though the sum be express'd, if nothing be due to him: And quite otherwise in the like Case, if the Legacy be given by a Debtor: The Reason, I say of this difference is, because the Creditor is understood to bequeath only a Debt, Bond or Obligation: But the Debtor doth bequeath a certain sum by name, or the very thing it self expressly.

(k) Grass. §. legatum. q. 59.

8. A Testator in his Last-Will and Testament *inter alia*, saith, (*Whereas I have in my custody a certain Instrument of Writing wherein A. B. stands bound in the sum of 400 l. for the payment of 200 l. to C. D. I Will, That my Executor shall restore the said Bond to C. D. or pay him 200 l.*) After the Testators death, the Bond cannot be found among any of his Writings, nor any knowledge thereof possibly had: In this Case, Judgment was given against the Executor, and he condemn'd in 200 l. to *C. D.* as a good Legacy to him by the said Testator. (l)

(l) Anto. Faber. l. 6. tit. 17. de l. 17.

9. When a Debt is bequeathed, whereon nothing is due, the Bequest is fruitless, if the Testator believed it to be a good Debt, albeit the sum or quantity thereof were express'd in the same: But if the Testator when he bequeathed such Debt, knew there was nothing due upon it, the Legacy is good. (m) And although he who bequeaths a Bond, bequeaths the Debt contain'd therein; (n) yet he that bequeaths to his Debtor the Silver Cup, or the like, which he had of his in pawn for 5 l. doth not thereby bequeath him that Debt of 5 l. (o) The Reason is, because there is nothing but a Pawn or Pledge released, the duty and personal obligation still remains. Note, that he who bequeaths his Debts, is understood to bequeath his Credits, that is, the monies or what else is owing to him; for Debts, as was before observed, are taken both actively and passively: But in this sense of a Creditors bequeathing them, they are only taken actively.

10. If a Testator bequeath to *A. B. whatever C. D. owe him*; and *C. D.* at the same time wrongfully detain'd the possession of certain Lands from the Testator: These Lands shall pass by the Devise to *A. B.* as well as the money which *C. D.* owed the Testator; as hath been adjudged; (p) not at the common, but Civil Law; for it is more than presumed, that at the Common Law such words, though in a Will not Nuncupative, but written, are not capable of being by any legal Intellect strain'd to a Latitude of that extent; or, Whether he that bequeaths his Books of Accompt, or his Shop Books, shall thereby be understood to bequeath the Debts contained therein, (q) as also the monies in the said Books Calendaried by way of Accompt, and design'd for Trade, as is likewise evident by the Civil Law. (r)

11. Although the Bequest of a Debt is a good Legacy, so long as it is a Debt, and the Bequest unrevoked, yet the payment of a Debt to the Testator in his life-time extinguisheth the Legacy thereof formerly bequeathed by him: Not so, in case it were paid to his Executor soon after his decease. (s) And this holds true, albeit the Debt consisted in some certain specifical thing, if it perished in the Testators time; otherwise the Legacy is good. (t) Likewise, the Testators giving an Acquittance to the Debtor, doth extinguish a bequeathed Debt. (u) The reason hereof is, because by all these ways the very substance it self of the Debt, which was the thing bequeathed, is destroyed; (w) yet here note withal, That if a Testator doth demand a Debt, which he had bequeathed, not with any mind of abating the Bequest, but fearing the failure or future Insolvency of the Debtor, and shall after keep this money but it self, with some signification therewith what money it was: In such Case, the Legacy is good, notwithstanding such payment precedent; which holds yet more strong, in case the

Testator

(m) Surd. Decif. 142.
(n) Mant. lib. 9. tit. 1. nu. 9.
(o) L. 1. ff de Liberat. Legat.

(p) Thesaur. Decif. 235.

(q) De Prætit. l. 4. int. 3. dub. 7. nu. 22. & Mant. l. 9. tit. 1. nu. 9.

(r) Pap. Notar. l. tit de Leg. varf. African. & l. qui filiam. ff. de Leg. 3. ibid. Cujac.

(s) L. si id quod. ff. de Liberat. Leg.

(t) Bald. in l. qui post. Nu. 31. C. de leg.

(u) L. non quicquid. Sect. qui Calum. ff. de Leg. 3.

(w) L. fidei commissum. Sect. si rem suam. ff. de Leg. 3.

Testator demands it not, but the Debtor himself comes and offers (x) Mantie, de it, and with such earnestness as the Creditor-Testator cannot well refuse it. (x) And if afterwards the Testator makes a Purchase with part or all of this money which he so demanded, not with any mind of abating the Legacy as aforesaid, the Bequest remains still good to the Legatary. (y) So that if I bequeath thee a certain Debt, and afterward demand and receive that Debt, and it appear not to what end, or with what intent I did this, the Legacy of that Debt seems to be extinguished, unless I deposited the money, and set it aside or apart for the design of the said Bequest. (z) And although whilst the Testator lived, the Debtor were judicially condemn'd to him on the accompt of that Debt bequeathed, but not paid, the Legacy will hold. (a) Or in case the Testator having bequeathed money owing to him, shall receive Goods in satisfaction of the said Debt, or it be legally so adjudged to him, and shall preserve such Goods, the Legacy shall not be understood as void, unless the Testator doth after alienate the said Goods. (b)

12. *A. B.* and *C. D.* are joyntly indebted in 100 l. by Bond to *E. F.* who makes his Last Will and Testament, and therein bequeaths in this manner; viz. (*What A. B. owes me, I give to J. G. and what C. D. owes me, I give to J. W.*) In this Case it is said, that the Testators Executor obliged to give the Action upon the Bond to one of the Legataries, and the value of that Action to the other. (e) Which seems not over-consonant to Reason, for they both owed him but 100 l. yet the Executor after this rate must pay the Legataries 200 l. Besides, in the same Law it is acknowledged, that if the Testator after his Testament made shall release one of the said Debtors, the Legacy is void as to both the Legataries, because the release of one Joynt-Debtor, is the discharge of all the rest. (d) Which plainly implies there is but one Debt in the Case; and if that be bequeathed twice, it can be due but once; the ballance therefore seems more equillibrous, if the 100 l. were equally divided between the two Legataries.

13. *A. B.* makes his Last Will and Testament, and therein appoints his Executor to give *C. D.* 100 l. provided that *C. D.* surrender into his Executors hands a certain Bond or Obligation then in the custody of the said *C. D.* wherein *A. B.* the Testator stood bound to him the said *C. D.* in 40 l. and dies. *C. D.* likewise dies before the said Bond or Obligation is surrendered. The Question is, Whether the Executor of *C. D.* can claim the said Legacy of 100 l. It is resolved, That if the said Bond or Obligation were in being, and in the possession of the said *C. D.* at that time when the Testator made his Testament, and that *C. D.* knew of the Contents thereof, his Executor shall not have the

(e) Gloss in l.
ab omnibus ff.
de Legat. 1.
(f) Part. in dict.
l. §. in Testa-
mento.

Legacy of 100 l. because *C. D.* performed not the Condition of surrendring the said Bond or Obligation to the Testators Executor ; and therefore could not transmit the claim of the Legacy to his Executor : But if it was not at that time in being, or not in the power of *C. D.* or that he were ignorant of the said Devise conditionally bequeathed, there seems an impossibility imposed on the Condition of the Legacy to *C. D.* which makes the Condition void, and consequently the Legacy pure and absolute to *C. D.* whereby it becomes transmissible to his Executor. (e) The reason in Law is, because a Legataries death before the existence of a possible Condition doth extinguish the Legacy ; otherwise, where the Condition is impossible. (f)

(g) L. si scrip-
sist. & gloss.
ibid. de Legat. 2.

14. *A. B.* was obliged to *C. D.* in 10 l. absolutely in 20 l. conditionally, and in 40 l. at a day yet to come. *C. D.* in his Last Will and Testament saith, (*That whatever A. B. ought to pay me, I give and bequeath to J. G.*) and dies. In this case the 40 l. whole day of payment was not then come, is not comprized within that Legacy to *J. G.* because of that word (*ought*;) otherwise, if he had said, I give to *J. G.* what *A. B.* ought to pay me now or hereafter. (g)

(h) L. nomen
debitoris, gloss.
in §. uni ex hæ-
redibus ff. de
Legat. 3.

15. *A. B.* makes his Son and Daughter his Executors, and doth Devise certain Tenements, Bonds and Obligations to each of them. After in his Will saith, (*That he would have his Son pay all his Debts and Legacies, that so his Daughter may enjoy her Legacy entire to her self, and undiminish'd.*) The Question is, Whether the Son ought to pay all his Debts and Legacies ; so as that the Daughter may have her full and entire part and portion ? It is resolved in the Affirmative. (h) Yet understand it only as to her entire part and portion of her Legacy, not as to what she might otherwise claim as an Executrix.

(i) L. fidei
commissa. §. si
hæres. & gloss.
ibid ff. de Leg.
3. & l. omni-
bus ff. de judic.

16. A Testator in his Will appointed, That his Executor should lend *A. B.* 100 l. for three years at two *per Cent.* interest. Q. Whether *A. B.* is obliged to give Security by Bond with sufficient Sureties for payment of the principal with the said interest at the three years end ? Some are of opinion that he ought : But the Law is otherwise, and his own Bond is sufficient. (i)

17. If a Bond or Debt by Specialty be bequeathed to any one, the Executor is discharged, if he Assign the Debt or Action to the Legatary, albeit the Debtor be insolvent ; as thus, *A. B.* makes his Will, and *C. D.* his Executor : In which Will he saith, I give to my Cousin *J. G.* the Bond or Obligation wherein *J. S.* stands bound to me in 100 l. After he adds a Codicil, and therein forbids the exacting the 100 l. of or from *J. S.* and moreover doth in the same Codicil require of his Executor *C. D.* That out of the

the Debt which *N. O.* doth owe him he should pay the 100 l. to his Coſin *J. G.* and dies. *N. O.* mentioned in the Codicil is found Inſolvent. The Queſtion is, Whether his Executor *C. D.* be obliged to pay the full 100 l. to *J. G.* It is held in the Negative; and that the Executor is diſcharged from *J. G.* if he yield him the Action againſt *N. O.* though Inſolvent. (k)

(k) Gloſſ. in
Secd. Civibus. l.
Lucius. ff.
de Legat. 2.

18. *A. B.* owes the Teſtator 10 l. or a Horſe, the Teſtator doth bequeath the 10 l. to *C. D.* After the Debtor *A. B.* doth deliver to the Teſtator's Executor a Horſe, and is thereby diſcharged of the 10 l. becauſe the Election was in him, and the Legacy of 10 l. to *C. D.* is void. But ſuppoſe the Teſtator had bequeathed the 10 l. to one, the Horſe to another, and *A. B.* the Debtor having the Election in him, paid the 10 l. to the Teſtator's Executor; the Legacy of the 10 l. in that Caſe is good, and the Legacy of the Horſe is void. *Et vice verſa.* (l) Or ſuppoſe that *A. B.* did owe the Teſtator 100 l. who ſaith in his Will, [*That how much money my Executor ſhall recover from A. B. ſo much I give to C. D.*] In this Caſe, the Legatary may compel the Executor to recover the whole 100 l. for him from *A. B.* for this is no conditional Legacy; becauſe, if ſo, then the Legatary could not ſue the Executor, unleſs he had recovered the money from *A. B.* (m)

(l) Gloſſ. in l.
ut hærecib. ff.
de Legat. 2.

(m) Gloſſ. ibid.

19. Debts by Bonds or Specialties are not comprized in a general Legacy, as ſuppoſe the Teſtator doth Deviſe to his Brother the one half of his Goods and Chattels (except the houſe wherein he lives, left him by his Father, with all the things therein) and make him his Executor of half of his Eſtate; and then deviſed to his two Uncles the other half, and makes them his Executors of that half. The Queſtion is, Whether all the things in the ſaid excepted Houſe do belong to his ſaid two Uncles, or to his Brother: In this Caſe, we muſt diſtinguiſh between the things which were in the ſaid excepted houſe; for if there were any Debts by Bonds, Specialty, or the like, they are not comprized within the Exception made as aforeſaid, but do belong both to the Brother, not as a Legatary, but as Executor of a moiety, and to the two Uncles as Executors of the other moiety; but if they are Silver, Houſhold-goods, and other things in the ſaid excepted houſe, they belong to the two Uncles as Executors of a moiety not to the Brother, who is barr'd by the ſaid Exception. (n)

(n) Cuius Scies.
& Gloſſ. ibid.
ff. de Legat. 2.

C H A P. XXIV.

Touching Election in point of Legacies : To whom the Election of a Legacy, express'd with too much Generality or Dubiety belongs, whether to the Executor or to the Legatary ; with certain Cases in the Law touching the same.

1. **A**S preliminary to this, it is requisite to know, That a Legacy may be too general, or of something too generally express, and that in a threefold respect ; as, 1. When it refers to something that is understood by the Notion of *Genus generalissimum* ; as when the Testator saith, (*I bequeath something to A. B.*) In this Case, the Legacy is vain and fruitless, because the Executor is discharged by giving any thing, or the least of any thing : Or, 2. When it refers to something that is (if I may so say) sub-alternatively too general, that is, such a general as is made up of innumerable distinct Specificals ; as if the Testator should say, (*I bequeath a living Creature to A. B.*) In this Case also, the Legacy is void, by reason as well of its super-generality as uncertainty : Or, 3. When it refers to something less general, yet comprehensive of many Individuals, for kind the same, but different in value or estimation ; as if the Testator should say, (*I bequeath a Horse to A. B.*) or, (*I bequeath a Ship to A. B.*) In this Case it must be distinguished, whether such thing hath its Composition terminated by Nature, as Ox, Horse, &c. Or by the Art of Man, as House, Coach, &c. in the former of these Cases the Legacy is good, and the Executor (if there be Assets) must procure it for the Legatary, in case the Testator had it not of his own at the time of his death. (a) But in the latter Case, the Legacy is not good, unless the Testator were a Proprietor thereof at the time of his decease. (b)
2. Now the Question is, when the Testator doth devise in such a general manner as is before described to be devisable, who shall have the Election, whether the Executor or the Legatary ? the first and common answer is, That he shall have it, to whom the Testator by his Will, in the manner of his bequeathing, directs the executive power of the Legacy, in case he hath not otherwise determined expressly the Election. For Illustration : The Testator saith, (*I will that my Executor shall give A. B. a Horse*) There the Executor Elects. Or thus, (*I will that A. B. shall have a Horse :*) There the Legatary Elects. But if the Testator direct
- (a) Gomez Re. fol. tom. 1. c. 12. nu. 32. & to. 1. c. 11. num. 8. & Grass. l. legatum. q. 61. & Ang. Marheac. lib. 2. c. 21. nu. 2. de Legat. 1.
- (b) Gomez. ib. & Vafq. de Success. Progr. lib. 3. Sect. 27. nu. 35 & Grass. dist. q. 61. & l. Si Domus. ff. de Legat. 1. & Cujac. ad L. Si servus Sect. cum homo. ff. de Legat. 1.
- the

the Executive power to neither of them, then the Legatary shall Elect, if the general Legacy be determined (as aforesaid) by Nature, and it be found among the Testators Goods or Chattels; otherwise, the Executor Elects, as when the general Legacy is determined by some Act of Man, (c) for instance, in divers Houses which the Testator hath in the same Corporation, and he deviseth one of them, but describes not which; otherwise if in divers Corporations; for then it shall be understood of the House in that Corporation where himself lived died. (d)

3. For the more transparent inspection into this matter, it is requisite likewise to be known, and what indeed is plainly inferential from the Premises, that there may be and frequently is such uncertainty in Legacies as doth not destroy them; This Election, whereof we now speak, consists in such uncertainties; But withal there are also such Obscurities, Dubieties, and Ambiguities in some Legacies, as admit of no Election, but only a Declaration, the Privilege whereof the Law ever entitles the Executors and not the Legataries unto. (e)

4. Note, That if a Testator hath but two things of the same kind, whereof he indistinctly bequeaths one, the Legatary hath the Election; if more than two, the Executor. (f) And if the Legatary having the Election shall delay it longer than need requires, the Ordinary at the instance of the Executor may set the Legatary a time, within which he shall determine his Election, on pain of forfeiting his Election to the Executor. (g) But if the Legatary happen to die before his Election, his Executor shall have it. (h)

5. As it is a Question who shall have the Election, so likewise is it a Question what or which the Elector may Elect. If the Election doth belong to the Legatary, and it be given him by the Testator, the DD. are much at variance in the point; some holding that he may chuse in that case the best of the Devised Eligibles; Others say, not so, but *in medio consistit Electio*; Others distinguish and say, That in such case if the thing devised be found among the Testators Goods he may chuse the best, otherwise he must content himself with a Mediocrity. (i) But the more received and approved Opinion is, That when the thing bequeathed is the Testators, and he expressly give the Election to the Legatary, he may then chuse the best. (k) And where ever the Law says the Legatary must regulate his Election, or take the measure of his choice by a rule of Mediocrity, (l) It is not meant of an Election given by the Testator to the Legatary himself, but to a third person for him, who not chusing at all, the Law transfers the choice not to the Executor, but to the Legatary. (m)

6. Where

(c) Grafs. dict.
1. legatum.
quæst. 62.
(d) Grafs. ibid.

(e) De Præstis.
lib. 1. int. 1.
dub. 3. Sol. 4.

nu. 8.
(f) Charond.
obs. in verb.
Electio & l. qui
duos. l. si quis.
§. penult. & l.
legato. §. ult.
ff. de Legat. 1.
(g) Fran. Gui-
mind. l. 1. c.
26. De Usuris.

i. Mancipiorum.
l. si Oportio ff. de
Opt. Leg.

(h) Ranchin.
Decis. par. 1.
Conf. 387. &

Guid. Pap.
quæst. 240. &
Charond. Resp.

lib. 4. cap. 95.
(i) De Præstis.
lib. 1. int. 1. dub.

3. fol. 3. nu. 7.
& l. unum. §. si
tem. ff. de Les-

gar. 2.
(k) l. 2. ff. de
Opt. Legat.

(l) l. ult. C.
Commun. de
Legat.

(m) Cujac. Obs.
lib. 23. cap. 14.

6. Where the Law, and not the Testator, doth cast the Election, upon the Legatary, there and in that case he may not chuse but what is inferior to the best, where there are more things than two of the same kind, subject to the Election. (n) On the other hand, when the Election belongs to the Executor, and the thing generally Devised be found to be among the Testators Goods, and but two of that kind, in that case the Executor may chuse the worst of them for the Legatary. (o) Yea, though the Testator had more than two, or many of the same kind, so as the general Legacy were of something inanimate, provided that that least or worst be not decay'd and altogether unprofitable, as Bras Money instead of the real *Diana*, or decay'd Wines instead of rich Canary. But when the general Legacy is of things animate, then the Executor ought to chuse for the Legatary as not the beg, so not the worst, but at an equal distance between them both. (p) But if the Legacy be not of generals, but of something certain and specific, yet which of them the Testator (he having many of the same kind) intended, is a *Non Constat*; the Executor in that case may deliver the least; because now the Question is not so much touching the Election as the Declaration, which the Law ever gives to the Executor; for Election refers to uncertainties, but Declaration to obscurities, as in the last precedent Case. (q)

(q) i. in Obscu-
ris. ff. de Reg.
jur. in obscuris
equimur quod
Minimum est.

7. Suppose a Testator doth bequeath a Horse or an Ox to *A. B.* which he will, or which he shall chuse; and he supposing an Ox only to have been given him in the Will, makes no other demand of the Executor than of the Ox, who delivers it him accordingly. Afterward finding his error, and understanding that he had it in his right to chuse either a Horse or an Ox, demands a Horse, and restores the Ox. The Law is against him, and leaves him in this case without Remedy. (r) The Law is the same in case the Executor by the Will, having the Election in himself, whether to give him the one or the other; but supposing a Horse only to have been given him, doth deliver it to him accordingly, and after finding his Error would remand it, and give him an Ox; he cannot. (s)

(r) i. si is cui &
gloss. ibid. ff.
de Legat. 2.

(s) Gloss. ibid.

8. If a man bequeath to *A. B.* a Horse, or a Yoke of Oxen, and the Testator hath neither Horse nor Yoke of Oxen, nor that which he so bequeathed, yet is the Legacy good, and the Executor chargeable therewith; In which case the Election as to the value of the thing bequeathed, whether in the Executor or the Legatary, may vary (as was formerly hinted) according to the Testator's words in the manner of the disposition it self. (t) And therefore if a man bequeath one of his Horses to *A. B.* not saying which Horse, in this case *A. B.* shall have the Election, if there be more than one: But if the Legacy be directed

(t) Perk. Sect.
Sect. 511. 525.

sted not to the Legatary but to the Executor, as when the Testator saith, [*I will that my Executor shall deliver A. B. one of my Horses*] In that case the Executor hath the Election, and may deliver which of them he will.

9. If the Testator saith, [*I give 10 l. to A. B. or C. D.*] at my Executors choice, or as my Executor shall chuse; and the Executor shall after make choice of one of them, and pay him 10 l. he is discharged from the other. But if he will make choice of neither of them, each of them may demand the whole 10 l. as if the Legacy were given to him alone; (u) and then he shall be prefer'd in this case who first Commences his Suit; (w) In other Cases who first gets Judgment.

10. If there be a doubt and dispute between two persons pretending to the same Legacy, to which of them it belongs; as if the Devise be to *Thomas Stiles*, without other description, distinction or discrimination of the Person, and there be two of that Name, of equal respect with the Testator, or both alike, his Friends or Acquaintance; In this case the Executor hath his Election to deliver the Legacy to which of them he please. (x) Yet some are of Opinion that in such case the Legacy is void and null by reason of uncertainty. (y)

11. I Devise to *A. B.* my Dwelling-house, if he doth not chuse my great Meadow in *Dales*. This is all one as if I said, I Devise to *A. B.* my said House or Meadow, which he will. (z) Or as if I said, I Devise to him my Meadow if he doth not chuse my Dwelling house. In both which cases *A. B.* hath his Election. (a)

12. If the Testator saith that *A. B.* shall have one of his Horses, or that he shall chuse one of his Horses, which he will, and *A. B.* through a mistake doth chuse a Mare; he hath determined his Election, and though he repent of his choice and would restore the Mare, he cannot chuse again; (b) as also because Mares do pass in a Devise of all the Testators Horses. (c)

13. If a man having two Horses doth bequeath one of them, but it doth not appear which, in regard the words of the Legacy are not directed either to the Executor or Legatary, so as thence to infer unto which of them he intended the Election. In such case the Legatary shall have the Election; because it being certain that a Horse he bequeathed, but uncertain which, not expressing himself at which certain Horse he aim'd the Legacy; The Executor shall not in this case interpret his mind; for in all doubtful Cases it shall be construed in favour of the Legatary. (d)

14. *A. B.* Covenants with *C. D.* to convey him such a Field, or to pay him 50 l. which of the two *C. D.* please. *C. D.* makes his Will, and therein gives to *J. G.* whatever *A. B.* owed to him the said *C. D.* and dies. The Question is, what *J. G.* can by this Devise recover

(u) L. si Titio.
& gloss. ibid. ff.
ff. de Legat. 2.
(w) Bart. in
disq. Leg. &
Rubr. ibid.

(x) L. si quis
servum, §. 3.
ff. de Legat. 2.
(y) Gloss. ibid.

(z) L. cum ita
ff. de optio.
Leg.

(a) Gloss. ibid.
(b) Gloss. in L.
servi ff. de le-

gat. 1.
(c) L. Martia-
nus, ff. de Le-
gat. 1. & Col.
Lex. verb.
Legat.

(d) Gloss. ib.
qui duos, ff.
Legat. 1.

from the Executor of *C. D.* The answer is, he may compel him to Commence an Action against the said *A. B.* And as *C. D.* had his Election whether he would have the Field or 50 l. which Election

(e) Gloss. in §. upon his Decease came to his Executor : So now by vertue of this devise that Election shall be in *J. G.* as the Legatary of *C. D.* (e) *fi quis ira. l. fi sic legatum. ff. de Legat. l.* 15. A Testator having eight fat Oxen, saith I give them all to

A. B. or 10 l. for each of them at his own choice. *A. B.* doth chuse four of the Oxen, and doth demand 40 l. for the other four. This the Legatary may not do ; for the Legacy of all the Oxen is but one Legacy, and therefore may not be divided. (f) Also the value of the

(f) *L. neminem ff. de Legat. l. 2. & gloss. in l. si ex toto. ff. de Legat. l. 1.* Oxen is but one Legacy ; for which reason neither may that be divided. (g) The Case is the same, if a man bequeath 50 Gallons of Sack or Five Shillings for each Gallon, at the Legataries choice ; he cannot divide the Legacy, but must take it all in Sack, or all in Money ; Otherwise if such Division were Admissable, and the Testator should give such a Horse or Five pounds at the Legataries choice, this absurdity would follow, the Legatary might take Fifty Shillings, and one half of the Horse. (b)

(h) In dist. gloss.

Where the same person is both Executor and Legatee, and consequently hath Election to take as either, yet he shall not take as Executor to the prejudice of other Legatees, nor as Legatee to the prejudice of Creditors in their Debts ; and therefore the same thing that a Legatary-Executor shall make his Election of as a Legacy, if there be not enough besides to satisfy all just Debts, shall be *Assets* in his hands as to Creditors, towards satisfaction of such Debts. (i)

(i) *Plow. 519. § 43. Co. 10. 47. 2. 37. Dyer 277. 367. Perk. § 57. 573. Brownl. and Goldsb. 185. More Case 470. 241. 474. 651.* If a man Devise, That after his Debts and Legacies paid, his Wife shall have the Residue of his Goods and Chattels to Distribute for his Soul, &c. And make his Wife his Executrix ; In this Case it is said she shall not have any Election, but must take as Executrix, and not as Legatee. (k)

Until a Legatary Executor hath declared or determined his Election either expressly or implicitly, the Law will judge it vested or settled in him not as Legatee, but as Executor ; Because the Law preferring the satisfaction of Debts before that of Legacies, will presume none of the Testators Goods or Chattels out of the Executor (as such) till the Debts be paid.

CHAP. XXV.

When and how Legacies or Devises are null, or become void or voidable ; with certain Cases in the Law touching Revocations.

1. **T**HE Reason why Legacies and Bequests do so often prove ineffectual, is not so much because they were originally null, or became afterwards void or voidable by any thing relating either to the state or person of either the Testator or the Legatary, or by reason of some accident hapning to the thing it self bequeathed : But because the Executor hath fully Administred (as the Common Plea is) and hath not Assets wherewith to satisfy the same. When the Legacy is originally void, it is understood as null ; when void by some subsequent Act relating to the state or person of the Testator, then it is understood as revoked ; when by something relating to the Legatary, then as forfeited ; and when by some fatal accident hapning to the thing it self bequeathed, then it is understood as lost.

2. Now a Legacy or Bequest may be said to be Originally null, when the Testator is a person incapable of devising at all, at least, of devising the thing devised ; or when the thing it self devised is not legally devisable, or when then the Testator's manner of bequeathing or devising is altogether illegal ; or when the Legatary or Devisee is such a person as is not legally qualified to take by a Devise. Likewise, the Legacy or Bequest is void or voidable by something relating to the Testator, when there is just fear in the Case, or circumventing fraud or immoderate flattery. It may be also by some kinds of error or uncertainty. Also by a subsequent or later Will, or by Revocation, Cancellation, Ademption, Translation ; as also for want of Assets. And when the Legacy or Bequest is void or voidable by something relating to the Legatary, it is commonly either by reason of some incapacity in his person to take by a Legacy or Devise, or by reason of some injury done the Testator by him and high enmity betwixt them ; or by endeavouring to conceal, sophisticate, or suppress the Will, or to obtrude and set up another instead thereof, charging it with falsity ; or by refusing to do some possible and reasonable thing incumbent by way of charge on the Legacy ; or by an unwarrantable assuming to himself by his own Authority, and usurping on the Legacy without the Executors licence, consent, or delivery thereof ; or by a total failure of some Condition annexed to the Legacy ; or by the

Legataries own waver and voluntary refusal thereof; or lastly, by the Legataries death before the Testators, or before the Condition performed, or before it otherwise become due. Finally, the Legacy or Bequest becomes void, in respect of the thing it self bequeathed, when by some providential and fatal accident without any neglect or default in the Executor, the thing bequeathed doth either totally perish, or is so decay'd as that it become uselefs and unprofitable.

3. Such as are intestable, are thence legally disqualified to dispose of any thing by way of Legacy or Devise; and who they are, appears elsewhere. (a) Testaments made and Legacies given by such, are void originally; and such as are originally void by reason of any defect in the Testator, that defect ceasing shall not be privileged with any subsequent Ratification. (b) *A Testamento ad Legatum valet Argumentum*. An Original defect in the Testator will make the Testament and all the Contents thereof defective also. (c)
4. If the manner of the Disposition of a Bequest or Devise be illegal, it renders the Bequest originally null; as when the Testator wholly refers his Will therein to the pleasure of his Executor or any other person, as if the Testator should say, [*I make such my Executors as my Son shall think fit:*] Or [*I give 10 l. to whomsoever my Executor shall please.*] (d) There are several other ways whereby the manner of the disposition may be illegal, and possibly the more in regard of that vast extent and latitude of words, which the Law allows Testators in making Wills, and bequeathing Legacies: No words, or language, or signs almost but may serve for a Bequest, provided they be but sensible and intelligible. (e) Inſomuch, that though the Testator should quite hold his peace, and but nod thee a Legacy, whether he can speak or not, or whether interrogated thereunto or not, the Legacy is good. (f) Understand not this of the Testator nodding between sleep and wake, between sense and no sense; but when by his nod he makes an intelligible sign of his mind and intention; the reason hereof is, because the Law more favours a Testators Will than his Words. (g)
5. If the thing bequeathed be not legally devisable, it is a void Bequest. (h) Or if the thing devised or bequeathed ceases to be the Testators, either by any voluntary act of his own, or thereunto compelled by some urgent necessity, the Legacy is extinguished. (i) Likewise if by the Testator the thing bequeathed be in its very substance and body so changed into another form, that it is not reduceable to its pristine substance: In such case it will be presumed, that the Testator hath also altered his mind, and the Legacy is void; otherwise, in case it may again be reduced.
- (a) Vid. par. 1. cap. 7.
- (b) L. si filius familias. ff. qui test. fac. poss.
- (c) L. si quæramus ff. de Testa.
- (d) L. illa Institutio. ff. de hæred. Inst. ultima voluntas non debet ex alieno arbitrio pendere. Barr. Rubr. in dict. l.
- (e) L. 2. in prin. Commun. Leg. & l. legat. C. de Legat. & l. fidei commissi. in prin. ff. de Leg. & Alex. Conf. 100. nu. 7. vol. 4.
- (f) L. natu ff. de Legat. 1. & l. in Epistola ff. de fidei commissi & Mant. de Conject. vul. vol. 2. tit. 1. nu. 19.
- (g) S. Nostra. Inst. de Legat.
- (h) U l. supra. cap. 6.
- (i) Jason. in S. Sed si sepeparavit. l. cetera. ff. de Legat. 1. nu. 4. 132. & 134.

reduced to its former shape and fashion; (k) for by the dissolution (k) Bart. in l. Servum filii. §. si pocula l. i. ff. de Legat. i. & C. quantum. §. illud ff. de Leg. 3.

6. Although the thing bequeathed be devisable, yet if the Legatary be incapable, and legally disqualified to take by a Devise, the Legacy is as void in effect, as if it had never been bequeathed: (l) L. Scia. §. ab herede. ff. de aur. & arg. leg. Now as one contrary is illustrated by another, so by observing who are the persons qualified to be testable, you may infer who are the illegatary; and as all are testable who are not by Law specially prohibited, so all may take by a Devise, whom the Law hath made no special provision against.

7. Every Legacy given by a Testator, circumvented by Fraud to bequeath the same, is void: (m) This is not to be extended (m) L. non enim ff. de in offic. Test. & l. i. ff. de Notion of *Dolus Bonus*. (n) And albeit Fraud, specially in the Testator himself, in reference to his Will, be not to be presumed; (o) (n) Bald. in l. si quis aliquid test. prohib. C. & Si- chard. in Rub. proof may serve to invalid the Legacy, specially if Natural ib. Affection, Piety, or Charity fall not under Consideration in the Case. (o) L. ex hoc edicto §. alienar. ff. de alien. indic. mut. caus. fact.

8. Likewise, if the Legacy were, as it were extorted from the Testator, or being under a Fear did give the same, it is void. (p) Here (as in several other Cases, purposely omitted to wave (p) Bart. in l. fin. ff. si quis aliquid test. prohib. (q) L. si quis ab alio. ff. de re judic. (r) C. ad audientiam & cum Dilectis. De iis quæ met. caus. fiunt. (s) Gloss. in C. cum locum. De sponsalibus. (t) L. ex hoc edicto §. alienare. ff. de alien. judic. mutan. caus. fiunt. (u) Perik. de Test. Conjug. l. i. c. 9. r. u. 13. & Jac. Sichard. Menoch. & alii. Proximity) the Law makes many Ampliations and Restrictions. If there were at the time of bequeathing a Fear upon the Testator, it could not be (as it ought) *Libera voluntas*. Yet understand, it must not be every Fear, or a vain Fear, but a just Fear, that is, such as indeed without it he had not made his Testament at all, at least not in that manner, nor given such and such Legacies. A vain Fear is not enough to make either Testament or Legacy void (q): But it must be such a Fear as the Law intends, when it expresses it by a Fear that may *Cadere in constantem virum* (r); that is, such a Fear as may produce such a Terror as to cause a well resolved person, specially in his sickness and weakness, to do what otherwise he would not. Now a less Fear will serve to terrifie a Woman in this Case, and so the Law understands it (s). But each of these must be well proved, otherwise they do no Prejudice either to the Testament, or any thing therein bequeathed (t).

9. Inordinate, Importunate and Immoderate Flattery destroys also the Disposition of a Legacy given to the Flatterer, or any other by his Sycophantick Sollicitations and Procurement, specially if Fear preceeded such Flattery (u); and Fraud accom-

¹ a) Sichard. in ult. C. si quis test. prohib. nu. 13.
 (b) Molin. in A. postill. ad Dec. Conf. 489.
 (c) Molin. ibid. Perk. ibid. nu. b. & in cap. 17.
 (d) Socin Jun. Concil. 14. Vol. 2.
 (e) L. generali & ibi Barr. ff. de usu fruct. leg.

panied it (a): Or in case the Testator's understanding be but little, and the Legacy great (b): Or more especially, if such immoderate Flattery proceed from such as have the chief care of the Testator in his sickness, as his Wife, Physician, or the like (c): Or in case there were a precedent Testament made by the Testator (d): Or when the flattering words are spoken to a person much in Debt (e). In all these Cases, specially it is, wherein immoderate Flattery circumstantiated as aforesaid, shall invalidate a Testament as well as the Disposition of a Devise or Legacy.

10. Touching Error in the Testator in reference to the Legacy or Devise, it must be considered whether it be an Error of the Name, Person or Quality of the Legatary? Or, Whether an Error of the Quantity, Quality, Substance, proper Name, or Name Appellative of the Thing bequeathed. If it be an Error only in the Proper Name of the thing devised, it doth not hurt the Legacy, so as the Substance thereof be not also mistaken; as when a Testator intending to devise *Long-acre*, deviseth it by the Name of *Black-acre*; erring not in the Substance, but only in the proper Name of the Thing devised: In this Case, the Devisee shall have *Long-acre*. Otherwise it is, if it be an Error in the Name Appellative; as intending to bequeath a Horse, he deviseth a House. The reason of this difference is, because the Names Appellative of things are innumerable, being ever so called, and of natural Constitution, as House, Horse, and the like; and therefore an Error therein is as injurious to Legacies, as an Error in the very Body or Substance of the thing it self devised. But the proper Names of things being only such as are meerly accidental, and given or imposed by them, are mutable, and may be changed by men, such as *Long-acre*, *Black-acre*, and the like; therefore an Error therein only doth not prejudice the Legacy (f). But if the Error be in the Name Appellative, the Testator saying, I bequeath a Horse, when he intends an Ox, the Legacy is not good; no, not of the Ox, albeit his intention thereof were evident (g). The Law is the same, in case the Error be in the Substance of the thing devised; as if the Testator intending to bequeath *h*, doth bequeath his white Mare (h). Such an Error is destructive to a Legacy, as an Error in the Name Appellative thereof (i), or as an Error in the Person of the Legatary, which is as prejudicial to a Legacy as either of the other; whence it is supposed by some, that *Jacob* was not *de jure* his Father *Isaac's* Heir, but *Esau*, because by an Error he mistook *Jacob* for his Son *Esau*, thereby erring in the very Person of the Legatary, and in the very Body and Substance of the Person he meant and intended: The best Salve in Law (not wading into the Mystery of Divine pre-ordination) for this is, That *Isaac* did not altogether

ther err or mistake in this matter ; but doubtedly only, in that he said, The Voice is *Jacob's* Voice, but the Hands are the Hands of *Eſau* ; whence it may well be inferr'd, That *Jacob*, and not *Eſau*, was *de jure* his Heir ; for though Error in the person of the Legatary, or in the Body or Substance of the thing bequeathed, doth vitiate the Legacy, yet a bare Dubitation or Hæſitation doth not (a). And as touching an Error only in the Quantity in the thing bequeathed, ſuch Error doth not prejudice the Legacy, at leaſt not ſo as to invalidate the ſame ; for if the Teſtator intending to bequeath 20 l. doth either ſpeak or write but 10 l. the Legacy is good for 20 l. not intending to give only 10 l. ſays 20 l. it is good only for 10 l. (b). Or if 200 l. be written inſtead of 100 l. it is good only for 100 l. that is not according to the ſcription, but according to the Teſtator's intention (c). And as thus it is in Quantities Numerical, ſo alſo it holds in Quantities known and diſtinguiſhed from the other by being Quotative, or indeed more properly Quantitative ; as if a Teſtator intending to deviſe all his Manſion-houſe, doth expreſs himſelf only by the one Moiety or third part thereof (d). Likewise Error only in the Quality of the thing bequeathed, doth no more vacate a Legacy, than doth Error in the Quantity, provided the Substance of the thing be not alſo miſtaken (e) : But an Error in the Quality of the Legatary, where ſuch Quality was the Final Cauſe of the Legacy, that is, ſuch as without which the Teſtator would not have given the Legacy (f), doth viciate the ſame ; becauſe the Law preſumes the Teſtator's intention to ceaſe at the ceaſing of the Final Cauſe thereof ; otherwiſe if the Quality be only ſuch, as were meerly a Demonſtrative or Moving Cauſe (g) ; yea, or an impuſſive Cauſe, if it be not by way of Condition joyned with the Legacy (h).

II. *Uncertainty* is another Impediment to the validity of a Legacy, and will make it void (i), unleſs by a ſufficient proof you can reduce the Teſtator's meaning to a Certainty ; ſo that if the Teſtator bequeath a Legacy to ſuch a one (not naming any body) as ſhall do ſuch a thing (naming the thing ;) this Devife is good to him whoſoever ſhall firſt perform the Condition before or after the Teſtator's Death. If this *Uncertainty* refer to the perſon of the Legatary, the Legacy is void (k), unleſs he who at firſt was uncertain, doth afterwards by ſome future Event become certain (l) : As if the Teſtator ſhould ſay ; I give 100 l. to whomſoever ſhall make my Son fit for the Univerſity. If it refer to the thing bequeathed, and proceed of Error, it's viſible by the Premiſes in what Caſes void or not ; if it proceed of too much Generality of the words of the Bequeſt, the Executor is diſcharged if he give any thing to the Legatary ; if it proceed of words too General relating

(a) Zaf. lib. 1. to any Specificall thing bequeathed, limited not so much by Nature
 sing. respon. in as by Man, as House, Ship, or the like, the Legacy is void (a). If
 prin. nu. 33. it refer to Number, Weight or Measure, the Bequest is unprofita-
 Alex. & Angel ble, because never so little is enough in that Case (b), unless be-
 in l. ii. Domus. queathed to some certain Use, by which means it may be regula-
 ff. de Legat. 1. ted, and so reduced to a kind of Certainty. If it refer to the Date
 (b) L. nummis. of the Testament wherein the Legacy was given, when there are
 ff. de Leg. 3. Two such Wills in dispute, neither is good (c), unless one of them
 (c) Glof. in L. be in favour of the Testator's Children, or to Pious Uses; in both
 ult. C. de edit. Di. Adria. tol. which Cases the Presumption of Law affirms that Will (where
 (d) Bart. in l. Two are in Being) which makes for either of them (d). But if
 1. §. 1. ff. bon. both the Wills of the same Date relate the one to one of them,
 poss. secund. Tabul. & Si- the other to the other, in that Case the Testament which respects
 chard in l. ult. the Testators Children shall be prefer'd (e) ; and yet this Un-
 C. de Edicto D. Adr. toll. & certainty doth not alway invalidate a Legacy to Pious Uses, where
 Mant. de Con- there is no other Will of the same Date in the Case; for if the Te-
 ject ult. Vol. stator wills, That his Goods shall be distributed [without other
 lib. 2. tit. 15. Words] the Law supplies the Sense, and interprets his meaning,
 nu. 17. to have it distributed amongst the Poor (f). It is presumed, the
 (e) Ibid. Mant. Law means where the Testator dies without Issue. This Uncer-
 lib. 6. tit. 3. tainty doth seldom arise from any dubious Expressions used by the
 nu. 43. Testator relating to the person of the Executor or Legatary, in
 (f.) In C. cum both which Cases both Will and Legacies are void respectively (g)
 ibi & ibi DD. omnes de Te- But it may often happen where the Testator hath more Friends
 stam. & Bald. n. than one of the same Name, of equal Degree to him, and Respect
 Executor. nu. 8. with him, Brothers or Sisters Children, unless he add some Di-
 ff. de Execut. stinction, or other Circumstances make it evident who he meant or
 rei judic. Idem intended ; or unless it may (as was before hinted) be reduced to a
 in Conf. 296. Certainty by some future Event (b).
 nu. 1. Vol. 5. (g) L. in tem- pus §. 1. eodemque ult. ff. de hæred. inst. & §. incertis inst. de legib. (h) L. quidam relegatus ff. de reb. dub.

(i) L. rem le- 12. Again, a Legacy or Devise may be void by the Testators
 gatam. l. si ser- making a latter Will, and not inserting the same therein. Like-
 vum ff. de adim. wise the Testators voluntary Alienation of the thing bequeathed,
 Leg. 2. is an actual Revocation thereof (i). The Reasons are, because the
 (k) L. unum ex Law thence presumes the Testator would not have his Executor
 familia §. si rem Law thence presumes the Testator would not have his Executor
 tuam ff. de L. g. burthened with the Redemption (k). As also because a Revocation
 2. in the Law hath as much force to revoke, as a Disposition hath
 (l) L. si ita scri- to dispose (l). Et Contrariorum eadem est Ratio. The like effect
 ptum §. Regula to make void a Legacy hath Cancellation, or when the Testator
 ff. de lib. & Bald himself, or by his Order, doth totally Cancel the Legacy; yet if
 Possi. & Bald a Legacy given to Pious Uses be found Cancelled, and it appear
 in l. ult. nu. 9. de not whether the Testator or any other by his direction did it, the
 instit. & Subst. Law will presume it to be done not wittingly and willingly, but
 (m) Bart. in l. Law will presume it to be done not wittingly and willingly, but
 proximæ in fin. inconsulto and unadvisedly (m).
 ff. de his quæ test. de len.

A Legacy or Devise may also be made void by *Ademption*, which is a taking away of the Legacy by the Testator expressly in Fact, or in Construction of Law. And this *Ademption* may be by the meer naked Will and Pleasure of the Testator, without (e) L. si jure ff. any Reason solemnly given by him for so doing (e). And in a Co-de leg. 3. & l. 3. dicil he may make an *Ademption* of that Legacy which he had § ult. ff. de a- dim. Leg. before bequeathed in a Will ; As thus, viz.

14. *A. B.* of *London* being bound for *York*, makes his last Will and Testament before he begins his Journey, wherein he appoints *C. D.* and *E. F.* to be his Executors. And commanded, That in case he should happen to die at *York*, they shall give *J. G.* of that City 100 *l.* to bring his Body to *London*; and if any Money of that 100 *l.* were left over and above the Charges of such his Funeral, *J. G.* should have it. The same day *A. B.* makes a Codicil, and therein desires his Executors, That in case he died at *York* or on the Road, they should cause his Body to be brought back to *London*, and there buried by his Wife and Children. After the Testator dies either at *York* or on the Road. The Executors cause his Corps to be brought to *London*, and there buried as he appointed in the said Codicil. The Funeral cost 60 *l.* *J. G.* demands the remaining 40 *l.* the Law will not give it him, because in the Codicil there is an *Ademption* of the Legacy express'd in the Will, and a Translation thereof to the Executors implied in the Codicil. (f)

(f) § quis filius l. alumnae. ff. cod.

(g) L. 3. § si du- obus ff. de adim. legat. & Bald. in l. si plurib. nu. 1. ff. de Legat. 1.

(k) Glof. in l. ult. in fin. ff. de his quæ pœn. nomin. & Bald.

(i) Glof. in l. cum servus in de adim. Leg. (k) l. si ita leg. ff. de legat. 1.

(j) Glof. in l. ult. in fin. ff. de legat. 1.

15. In Cases doubtful the Presumption shall not be for an *Ademption*; (g) therefore where other Conjectures may be had, such Presumption shall cease: For which Reason, if the Testator gives his House to one, and after in the same Will give the same House to another, it shall not be construed, as if he would take the House from the first, but rather that he would have them both Collegataries, unless there be very pregnant Proof of the Testator's Intention to the contrary. (b) Otherwise if a Testator doth devise a House to *A. B.* and after give the same House by Deed of Gift to *C. D.* in this case the Devise to *A. B.* is extinct. Or if after he buys the same House of *C. D.* and dies, and *A.* demand the House, he cannot recover it, unless he can prove that the Testator by a new Declaration of his Will intended he should have it. (i) Likewise if a devised House be pull'd down, and another built by the Testator in the same place, the Devise is void, unless it can be proved that the Testator intended otherwise. (k)

16. The effect of an *Ademption* may also happen in defect of performance of some Condition charged on the Legatary; but a Condition depending meerly upon the Testator himself, works no *Ademption*, in Case it be never performed. The Rea-

sons in Law are, Because such a Condition, if deficient, shall be understood, as if the Disposition were pure and simple without any Condition at all; as also because such a Condition is not held as a Real Condition, but rather as the counterfeit thereof. For Instance, Suppose the Testator in his Testament saith, [*I will that A. B. shall have 20 l. if I so order it in my Codicil, or if he doth what I shall there appoint him.*] The Testator dies without making any Codicil, or having made one, there appears nothing therein appointed by him for *A. B.* to do; he shall have the 20 l. notwithstanding such Condition, for the Reasons aforesaid (1).

(1) L. si quis ita
& Gloss. ibid. ff.
de hered. instit.

17. Another way whereby Legacies become void, is when the Testator takes them from one, and gives them to another, which the Law calls *Translation*, and which is more than a bare *Ademption* thereof; for this doth only take it away, but that doth not only so, but gives it to another, or takes it from one that it may be given to another, or takes away one thing that another may be given; so that *Translation* compriseth in it *Ademption* and Bequeathing (m.) [What I gave to *A. B.* I do give to *C. D.* It is a Translation to *C. D.* implying an *Ademption* from *A. B.*]

(m) Argum. &
Rub. in tit. de
adim. Legat.

18. This *Translation* may be four ways, as either from one Legatary to another, or from one Co-executor to another, or from one thing to another, or from a pure, simple, and absolute Legacy to a Conditional one (n). And it carries with it the same Conditions the Legacy had before its Translation, unless it be such a Condition as is inherent in the Person of the first Legatee: As if a Merchant Testator should give in his Will 500 l. to his Son *John* then in the *Straights*, upon this Condition, if his Ship shall safe arrive from the *Straights*. After he takes this Legacy from his Son *John*, and by way of *Translation* gives it to his Son *William* at home without any Repetition of the said Condition, and dies. In this Case, and notwithstanding such Condition were not repeated in the said *Translation*, yet the Law implies it, and *William* cannot claim the 500 l. till the Ship returns. Not so, in Case the Condition were inherent in the person of *John* the first Legatee; as if the Testator had said, [I give my Son *John* 500 l. upon this Condition that he come home safe in my Ship from the *Straights*.] In this case the Law will not imply the Condition as repeated in the *Translation* to *William*, which was necessary in the person of *John* (o).

(n) Gloss. in l.
sicut adim. ff.
red.

(o) L. Legatum
& Glo. ff. ibid ff.
cod.

19. Suppose a Testator gives *A. B.* a House simply, purely and absolutely; after in the same Will gives to the same *A. B.* the same house conditionally; and after says, I would not have my Executor to deliver *A. B.* the House which I gave him conditionally; In this case the House is not due to *A. B.* on any account, unless

unless the Testator had expressly added withal, that he would have him to have it purely, and without any Condition. (p) Or if a Testator in his Will give *A. B.* 100 *l.* and in his Codicil 50 *l.* in which Codicil he saith, 'That he would not have his Executor to give him more than 50 *l.* In this case, there is an Ademption of 50 *l.* from the Legacy of 100 *l.* given to *A. B.* (q).

20. A Testator saith, I give my House to *John Styles*, and my Ground to *William Styles*; after in the same Will saith, [What I gave to *Styles*, my Will is to have it taken from him] And so it doth not appear, from which *Styles* he intended: In this case, the Devises are due to both the *Styles*: For if he had given a Legacy to *Styles*, and no Evidence of which *Styles*, the Law would have been, that it is due to neither; and therefore by parity it shall in the other case be due to both. (r)

21. A Testator gives 100 *l.* to his Daughter, saying withal, That if she will not marry with *A. B.* it shall be taken from her, and given to him, and dies. After the Daughter also dies, and before she was capable of Marriage, or qualified for consent there-to: In this case, the Legacy of the 100 *l.* is not translated from her to *A. B.* because the Translation here seems to be threatned *Nomine pena*; and where there is no fault, there ought not to be any punishment. (s)

22. Legacies may be also void or voidable by reason of the Incapacity of the Legatary to take by a Legacy or Devise, and this may happen several Ways. Generally whatever incapacitates an Executor for an Executorship, hath the same effect on a Legatary as to a Legacy. (t) But more particularly, if capital and grievous Enmity happen between the Testator and the Legatary, that alone by the naked or tacite Will of the Testator, that is, without any solemn or expresse order from the Testator, is an Ademption in Law of his Legacy; but if they happen to be after recorded, the Legacy returns to its pristine Validity, because every Man's Will is ambulatory (so the Law phrases it) to the very last moment. The Law is very clear in this point, (u) which tacitely so understands it. (v) Yea, this holds true, albeit the Testator himself were the first cause of the difference between them (x); because it is thence inferred, that he hath changed his mind: Yet the Law in this point is not without its Restrictions; for it will not hold in all cases, specially where the Legatary hath deserved well of the Testator; nor shall every light offence intervening work this Ademption. (y) But a criminal Accusation will amount to this capital Enmity: (z) And therefore if the Legatary shall accuse the Testator of some capital Crime, he is understood as his capital Enemy; and consequently the Law implies an Ademption of his Legacy. (a) Likewise the Law

(p) Gloss in l. fundo & gloss. in l. cum centum. ff. eod.

(q) Dig. gloss. & l. si quis ita §. cum Titio ff. eod.

(r) Gloss. in l. fundo ff. de adim. Legat.

(s) L. sancimus. C. de penis. & Mant. de Con-ject. ult. vol. 12. tit. 3. nu. 2. & alii.

(t) Gloss. in l. 3. § fin. ff. de acimend. Leg. & l. ex part. tit. eod. & Mant. de Con-ject. ult. vol. 12. tit. 4.

nu. 2.

(u) L. si inimicitia ff. de iis quib. ut indign.

(v) L. 3. § ult. ff. de adim. Leg.

(x) L. 4. ff. de adim. Legat. & Mant. lib. 12. tit. 5. nu. 9.

(y) Gloss. in l. fundo. ff. de adim. legat. & l. si quis ita § non solum. ff. eod.

(z) Gloss. in l. a. in l. filio. §. Scia. ff. de adim. Leg.

(a) Ibid.

(b) Gloss. in l. fidei commiss. in fin. ff. de fidei V. Jafon in l. foro. nu. 5. tit. eod.
 (c) Gloss. Bert. & alii communiter in dict. l. fidei commiss. ff. de fidei & Bert. in l. i. ff. de iis quibus ut indign.
 (d) Gloss. in l. ex parte ff. de adm. Legat. Ratio est, quia Inst. habet. (b.e.) Executories est caput Testam. gloss. min. ibid.
 (e) L. post Leg. ff. de his quib. ut indign.
 (f) L. si Legatarius, & ibi Paul. Castrenf. in summa C. de Legat.
 (g) L. si quis cum falso, § Divus, & l. si quis patr. ff. ad leg. Cor. de falsis.
 (h) L. non dubium C. de Leg. Sichard. in dict. l. non dubium & Perk. tit. Testam. fo. 4.
 (i) Bart. in l. Titio § Lucius ff. de Leg. i. & alii.
 (k) Socin. Con. cil. 11. l. 1. & Olden. de Añon. class. 2. Acti on. 2. f. 113.
 (l) Sichard in dict. l. non dubium nu. 13.
 (m) Tiraqua de privileg. p. 2 Cause cap. 45.
 (n) L. si post. ff. quando dies leg. céd. (o) L. unico. §. cum igitur C. de caus. tollend.

tacitely implies the same, in case the Legatary should tacitely commit a Trespass on the Testator's Wife (b) which is no less true in the Theory as to matter of Law, than common in the Practice, as to matter of Fact. Likewise if the Testator bequeath to his Wife, and she play the Whore, she forfeits her Legacy (c).

23. By the way observe, That an Executor is not deprived of his Executorship by intervening Enmity between him and his Testator, as the Legatary is of his Legacy; for albeit whatever invalidates an Executorship, is equally fatal to a Legacy; yet this will not hold *vice versa*: For put the Case, That the Testator makes A. and B. his Executors, and bequeaths to A. 100 l. After there arises very grievous Enmity betwixt the Testator and A. the Co-executor and Legatary also: For which reason the Testator resolves upon making another Will, and to take from A. whatever he had given him. And having accordingly begun to make such second Will, dies before he could finish the same, or therein say any thing as to A. Whereupon A. as one of the two Co-executors and Legataries claims both a Moiety of the Testator's Personal Estate, and the Legacy of 100 l. also. The Question is, Whether he shall have both? It is answered Negatively, He shall have a Moiety of the Personal Estate, but not the Legacy, because a Legacy may be taken away by the bare and naked VWill of the Testator, that is, by his VWill tacite, and without any solemn Formalities: but the Executorship not so (d).

24. Add to this, That in case the Legatary shall after the Testator's death in his own name accuse the Testament of Falsity, he loseth his Legacy (e). Likewise if he shall surreptitiously get into his custody the Testament, and conceal the same, he loseth the Legacy therein bequeathed to him (f). Or if he cancel the Testament, his Legacy is lost (g). Or by his own Authority, without the Executor's Consent or Delivery, shall usurp the possession of what is bequeathed him: In such case he forfeits his right thereunto (h); unless the Testator himself licensed him so to do (i); Or that he had it in his possession at the time of the Testator's death, there be Assets sufficient to pay his Debts: In which case he may lawfully retain the thing bequeathed to him, without the Executors delivery thereof (k): Or when he is as well Executor as Legatary (l): Or lastly, when the thing is bequeathed to pious Uses (m).

25. Again, unless the Legatary survive the Testator, the Legacy will not be due (n). Otherwise, and if it be not conditional, nor made payable at a future time certain, it will be due immediately upon the Testator's death (o). Therefore if the Lega-

tary

tary die before the Condition performed, or the day of payment be come, the Legacy is lost (*p*), if that time were limited not to a day certain but uncertain (*q*). Otherwise, and the day be certain, though the Legatary dies before it comes, the Legacy shall accrew to his Executors, for in that case the Legacy was due at the Testator's death, though not payable till that day certain be come (*r*). But if the day or time be altogether uncertain, the Legacy is then as if it were conditional (*s*): And the breach or non-accomplishment of a Condition, in it self lawful and possible, doth either suspend or extinguish the Legacy. As to that frequent Condition relating to Marriage, so commonly annexed to the Execution of a Legacy, it is not impertinent here to insert, That albeit a Condition absolutely against Marriage, is unlawful; yet not so, if it be only against Marriage with such or such a person, or with such kind of persons; and therefore the Condition is good, if the Testator gives his Daughter 200*l*. under this Proviso, That she marry with a Merchant, or a Merchant's Son, otherwise the Legacy to be void: In which Case, if she marry first with a Merchant, and after his decease with another who is not a Merchant, nor a Merchants Son, she shall lose her Legacy (*t*).

26. Lastly, The Legacy is but equivalent to a Cypher by voluntary waver and refusal of the Legatary, declaring his dissent thereunto; as also by the actual and total destruction of the thing it self bequeathed; for if neither the Quantity nor the Quality thereof can appear, the Legacy is void (*u*). Hence it is, That the Bequest of a Debt is void, if payment thereof be made to the Testator in his life-time; otherwise if after his death it be paid by the procurement of his Executor (*w*). But if the Testator himself doth exact the Debt, the Legacy thereof is extinguished (*x*). Otherwise, if paid to the Executor, by whose default if any other thing bequeathed doth perish, it shall be no loss to the Legatary (*y*); nor any loss to him, in case the Legacy be something in general, as an Horse or an Ox, not saying which; or in case the Legacy consist in Quantity, as so many Bushels of Corn, not saying of what Grain, or in what Garner or Granary: In which, and other like Cases, the Legacy is not void, albeit the thing so bequeathed shall utterly perish (*z*).

Upon Evidence in Trespass, the Case was, *A.* made his Will in Writing, and thereby devised his Lands to *E. H.* and her Heirs; and afterwards lying sick, because the said *E. H.* did not come to visit him, he affirmed, That *E. H.* should not have any part of his Lands or Goods. It was the Opinion of the Court, That it was no Revocation of the Will, being but by way of Discourse, *supra*.

(*p*) L. interdict
ff. de Cond. &
Demon.

(*q*) L. Dies incertus ff. cod.

(*r*) L. cedere diem ff. de verb. sig.

(*s*) Dist. l. dies incertus.

(*t*.) Mant. de Conject. ult. vol. lib. II. tit. 18. nu. 3.

(*u*) L. si sic §. 1. ff. de leg. 2. & l. Titia in prin. ff. de leg. 2. & l. cum post §. gener. ff. de jure dotis.

(*w*) L. si is quod ff. de liberat. leg. (x) §. tam autem corporales. Inst. de leg. & l. si sic §. 1. in fin. ff. de legat. 1.

(*y*) Paul de cast. in l. servum filii §. si pocula ff. de leg. 1. & senatus in tit. eod.

(*z*) L. incend. C. si cerpe. & l. non amplius §. 1. ff. de legat. 1. Pasch. 4 Jac. in B. R. Kinton & Simpson's Case. Cro. 2. part. II. §. & Hugh. Abr. ut

Discourse, and not mentioning his Will: But the Revocation ought to be by exprefs words, that he did revoke his Will, and that she should not have any of his Lands given her by his Will.

Trin. 6 E. 6.
Dyer 74.
Hughes ibid.

Lands devised by Will to one, and after a Feoffment thereof made by the Devisor to another; the said Devise is revoked by such subsequent Feoffment. As in the Lord *Boucher's Case*, touching his Will made 23 H. 8. Yea, though the Feoffment be not good by reason of some defect in the *Livery of Seisin* or otherwise, so that notwithstanding such Feoffment the Feoffor dieth seised of the Land, yet hereby the Testament as to this Land is Revoked. To this purpose suppose *A.* seised of Land, deviseth it by Will to *B.* and after makes a Feoffment of this Land to *C.* and going to seal it, saith, *Will not this hurt my Will?* Whereunto Answer is made, No. Then (saith the Devisor) I will seal it, and so did accordingly; also a Letter of Attorney to make *Livery*, which was made only in part of the Land. And in this case it was agreed to be no Revocation of the Will for the Residue of the Land wherein no *Livery* was made (1)

(1) Goldf. 33.
Pl. 7.

A Verbal Revocation is sufficient to Null a written Will, and therefore if a Testator doth but say (speaking *cum Animo non Testandi quoad hoc*) of his Will that he hath made in Writing, That it shall not be his Will, it is a Revocation thereof. But if the Question be asked of one that hath made his Will, Whether he hath, or will make his Will? Though the Testator should answer in the Negative to both, yet this doth not amount to a Revocation (2). And although a Verbal Revocation may null a written Will, that otherwise is good, yet a Verbal Affirmation will not make good a written Will, that in it self is void; for neither a Verbal nor any other Declaration by any Instrument in Writing whatever, can affirm a Disposition made contrary to the Rules of Law: And therefore where a Devise of Land in Writing is made to *A. B.* and his Heirs, if the Devisor surviving *A. B.* shall after the Devisees death by word say, That notwithstanding the death of *A. B.* his Will is, That *A. B.* his Heirs shall have the Land as absolutely as *A. B.* himself should have had it if he had lived; this Declaration will not confirm the Devise.

Trin. 33 El. in
C. B. Ashby &
Laver's Case.
Goldsb. 93. &
Hughes ibid. Vol.
5. tit. Revoca-
tion. Mich. 31
El. C. B. Goldsb.
109, 110 vid.
Co. 1. par. 62.
Forse & Hem-
blin's Case. &
Fergus ibid.

Note, By all the Justices, upon an Evidence to a Jury in an *Ejectment firmæ*, That if a man hath a Lease, and disposeth of it by his Will, and afterwards surrenders it up, and takes a new Lease, and after dieth; That the Devisee shall not have this last Lease, because this was a plain Countermand of his Will.

A Feme Sole was seised of Lands in Socage, and by her last Will devised them to *J. S.* in Fee, and afterwards she took the Devisee to Husband, and during the Coverture she countermanded her Will, saying,

saying, That her Husband should not have the Land, nor any other Advantage by her Will. It was adjudged upon great Deliberation, that it was a Countermand of the Will, the words being spoken after Marriage; for the making of a Will is but the Inception thereof, and takes not effect till the Devisors death. And indeed this very Intermarriage is a nulling of the Devise, inasmuch that the Heir of the Woman, and not her Husband, shall have the Land; for a Feme-Covert hath not any Will, it being in the Judgment of Law subject to the Husband's VWill.

One devised Lands to his Sister in Fee, and after made a Lease to her for six years of the Lands, to begin after his Decease, and delivered it to a Stranger to the use of his Sister; which Stranger did not deliver it to her in the Testator's life-time, and she refused, and claimed the Inheritance. In this case it was resolv'd, because the Devise and the Lease made to one and the same Person, beginning at the same time, cannot stand together in one and the same Person, That it was a Countermand of the Devise. But it was there agreed by all the Justices, That if the Lease had been made to any other than the Devisee, they might stand together, and the Lease should not have been a Revocation of the VWill as to the Inheritance, but only during the Term. The same case is put in other words little different from the former, That where one devised his Land unto J. S. in Fee, and 12 years after he made a Lease to the same J. S. for 60 years to begin after his the Devisor's death, and delivered the Deed to a Stranger, who did not deliver it to J. S. until after the death of the Devisor, and the Devisee never agreed to the Lease, but after the Devisor's death claimed the Land by the Devise; This was held to be a Countermand of the Devise. But it was Agreed, That if the Lease had been made to a Stranger, it had been no Revocation, for the Term. And it was also Agreed, That if the Lease had been made to J. S. to begin presently, or afterwards at any time in the Devisor's life-time, that this had been no Revocation; for then it might also have ended in his life-time, and so might have well stood and consisted with his Will. And therefore if a Devise be of a Mannor to one, and after a Devise of a Lease thereof be by the Devisor made to another, this is no Revocation for the Residue (1). By these Premisses it is evident, That of Devises there may be Revocations by Law Implied, as well as by the Devisor Expressed, grounded on this Rule in Law, That any Act or Thing done, or words spoken by the Testator after the Testament made, that doth alter, and is inconsistent with all, or part of his Testament before made, is a Revocation of it, or of that part thereof that is so crossed and altered (2).

In an Ejectione Firme upon Evidence to a Jury. It was resolved p

Mich. 2 Jac. in
C B Cook and
Bullock's Case.
Adjudged acc.
Cro. part. 49. &
Hughes Abr. ibid.

(1) Cro. ibid.

(2) Co. 4. 62.
& 3. 36. 8. 32.
& Lit. Sect. 162,
Plow. 343 344.
erk. Sect. 472.

Mic. 16 Jac. in
B.R. Cranvel &
Sanders Case.
Cro. 2. part.
487. & Hughes
ibid. Mich. 5
Jac. B.R. Web's
Case. Adjudg.
Roll. Abr. tit.
Devise. lit. D.
Mic. 1 Jac. B.R.
Goodwyn &
Goodwin's Case.
Yelv. Rep.

solved by the whole Court, That if one make his Will in Writing of Lands, and afterwards upon Communication saith, That he hath made his Will, but that shall not stand. Or I will alter my Will, &c. That these words are not any Revocation of the Will, for they are words but *in futuro*. But if he saith, I do Revoke it, and bear witness thereof, hereby he absolutely declares to Revoke it *in præsenti*; it is then a Revocation. And in this Case it was agreed by the Justices, That as one ought to be of good and *sane Memorie* at the disposing, so he ought to be of as good and *sane Memorie* at the Revoking of it. And as he ought to make a Will by his own directions, and not by Questions: So he ought to revoke it of himself and not by Questions.

If a Man devise 20 *l.* to the poorest of his Kindred, it is void by reason of the uncertainty whom the Court shall judge the poorest.

A Legacy of 20 *l.* given by a Testator to his Daughter, to whom his Executor gave Bond in 40 *l.* for payment thereof according to the Will. The Daughter takes Husband, who sued the Executor in the Ecclesiastical Court for the Legacy. The Executor pleaded payment according to the Bond; and because the Ecclesiastical Judge would not allow the Plea, the Executor brought a Prohibition, shewing by way of surmise the matter aforesaid. *Tanfield* Serjeant moved for a Consultation, because the Suit was for a Legacy, which is of Ecclesiastical Cognizance: And albeit the Executor pleaded Payment, which is not there allowed, yet he ought not to have a Prohibition, because Payment is a good Plea in that Court; and if the Judge there will not allow it, the other may appeal to the Superiour Judge; and if this should be suffered in the Case of a Legacy, then the Ecclesiastical Court should try nothing. But according to *Gaudy, Fenner* and *Yelverton*, Justices) the Surmise is good; for the Executor by entring into Bond to the Daughter for Payment of the Legacy, had extinguished the Legacy, and had made the 20 *l.* Devise a Debt, suable merely at the Common Law, and not there.

39 H. 6. 18. b.
Roll. Abr.
Rol. ibid. lit. T.
Mich. 38, 39 El.
B. R. inter
Mountague &
Jeffries Agreed
per Cur. &
Council. Roll.
ibid. lit. V. 26
El B. W. loock's
Case per G. w.
dety Roll. ibid.

A Stranger disposes the Devisor; if he die before Re-entry, the Devise is void.

If there be divers Devises of one thing in the same Will, the last Devise shall take effect, *Co. Lit. 112. b.*

If a man seised in Fee devise the same to *J. S.* in Fee, and afterwards makes a Lease thereof to *J. D.* for years; this is no Revocation of the Fee, but only during the Years. Also if afterwards he devise that Lease to another for Life, yet that

is not any Revocation of the Fee, but only during the Estate for Life.

If a Man possessed of a Term for 40 Years, Devise the same to his Wife, and after Lease the Land to another for 20 Years, and dye; that Lease is not a Revocation of the whole Estate, but only during the 20 Years, and the Wife shall have the Residue by the Devise.

It appears therefore, that a Legacy may indirectly, and by Implication be Revoked, as well as directly and expressly; also in part as well as in whole; and the Will may stand where Legacies in that Will do not.

But here Note, That *Revocations* in general are not favoured in Law; for which Reason he that will Null or avoid a former Will by *Revocation*, ought to be furnished with very good and sufficient proof for that purpose. (1)

(1) Litt. Bro.
55. Dyer. 310.
34. Eliz. B. R.
Burton's case.
Goldsb. 33.
Pl. 7.

A Devise of Lands is made to a Wife in Recompence of her Dower, and after she brings a Writ of Dower, and recovers her Dower; by this the Devise aforesaid becomes void. (2) Likewise the Devise of a Rent to the Wife in recompence of her Dower, is good: But if she bring Dower and recover the Rent, it seems the Devise is void. Her acceptance of the one, is a waiver of the other. (3)

(2) Leon. 1. 3
137.

In a Replevin upon Evidence given, the Case was this, *I. W.* was seized of the Lands in Question, and of divers other Lands; and by his last Will Devised all his Lands and Tenements to *A. W. of London* in Fee. After which he made a Feoffment in Fee of the same Lands which he had Devised to the said *A.* and when he Sealed the Feoffment, he demanded and said, will not this hurt my Will? To which it was Answered, That it would not: And he said, if this will not hurt my Will, I will Seal it, and then he Sealed it, and a Letter of Attorney to make Livery: The Attorney made Livery in some of the Lands, but not in the Lands in Question, afterwards the Testator died. It was said, That the Feoffment was a Revocation; for if the Testator had said, That this shall not be his Will, then it had been a plain Revocation, and then the making of the Feoffment is as much as to say, That the Will shall not stand. But it was Answered, and Resolved by the whole Court, That it Appeared, That the mind of the Testator was, That his Will should stand, and when he made the Feoffment, this was a Revocation in Law; and here is no Revocation in Deed; For he said, If this will not hurt my Will, I will Seal it: And although that the Attorney made Livery in part, so as the Feoffment was perfect in part; yet for the Lands in Question, whereof no Livery was made, the Will shall stand; for a Will may be effectual for

(3) Cro. 3.
128. Gollin
vers. War-
burton & Crisp.

Mich. 29. El. in
B. R. Gibson &
Plarles case.
Goldsb. 32, 33.
vid. Owen. 76.
the same Case.
Hugh's Abr.
verb. Wills and
Testaments.

part, and for part it may be Revoked ; and the Court told the Jury, That this was their Opinion, and the Jury found accordingly.

The Case in *Chancery* was this, C. E. the Testator, 15 *Jac.* made his Will in Writing, and thereby devised Legacies to Charitable Uses, and to R. and W. his Brothers, viz. to one an 100 *l.* and to the other 1000 *l.* and other Legacies to his Kindred ; and made his Wife his Executrix, and appointed his two Brothers to be joyned with her as Executors in Trust for his Wife ; afterwards 22 *Jac.* he sent for several Persons to come to him ; when they came, they demanded of him, What Friend he thought best to be his Executor, and to see his Will performed ? and whether he trusted any Person more than his Wife ? He answered, That his Wife was the fittest Person, and therefore should be his sole Executrix. Being then moved to give other Legacies to his Father, Brethren and Kindred ; He answered, He would not leave them any thing, but bequeathed to J. S. his God-son 30 *s.* And being requested by his Wife to give him a greater Legacy, He answered, Thou knowest not what thou doest ; do not wrong thy self, 30 *s.* is Money in a Poor Bodies Purse : And the Testator spake these words, *Animo testandi, & ultimam voluntatem declarandi.* And all this was set down in a Codicil : And the first Will and the Codicil was proved in *Communi forma.* Whether this Codicil was a Revocation of the Legacy given to the two Brothers, was the Question : It was resolved both by the Civilians, and by the Judges of the Common Law, That it was not a Revocation of the Legacies. Their Reasons were, Because there was an absolute Formal Will made in his Health, and there being no Speech made by him of his Formal Will, nor of the Legacies thereby devised. The Answer to a doubtful Question shall not take the Legacies away before devised : And his answering, I will not give them any thing : Upon such doubtful Speeches to nullifie a Will advisedly made, shall not be permitted, without clear and perspicuous Revocation, or words that

Mitch 2. Car. in Chancery, Express do amount to so much : And thereupon upon this Opinion of the Civilians and Judges, the Lord Keeper decreed the Legacies to the Brothers, the Codicil having made no Revocation of verb. Wills, &c. them.

One that had a Term of years in Land, devised that A. his Son should have the Use and Profit of it during his Life, and after that it should go to his Eldest Son, and after to any Heir-

(1) Cro. 3. 230. Male of his Body, and so unto divers others to keep it in his Name to make a Perpetuity : It seems to be a void De-
Cro. 2. 697. vise (1.)
Fav. vers. Hinde.

(2) Vid. Co. 1. Devises to Superstitious Uses are void (2.)

The Devise of a Remainder to a Person or Corporation not *in esse* at the time of the Devise, is *void*, though afterwards they come *in esse*: otherwise it is of a Remainder devised to a Corporation begun before the Head thereof be chosen (1).

(1) Job. 33.

If one devise his Land to his Wife for her life, and after to the Use *Reftorum heredum secundum evidentiam*, without more words; this (as to the Remainder) is a *void* Devise for uncertainty, and no Averment can make it good (2).

(2) Bulstr. 2. 98.

One that had a Daughter and a Brother, devised his Land in this manner, *viz. I devise my Land to my right Heirs of my Name and Posterity*. It was held, That neither the Daughter nor the Brother should take by this Devise, but that the same was *void* (3).

(3) Moor's Case 1181.

A Devise of Goods to an Exccutor is void, and he shall have the Goods as Executor, not as Devisee (4).

(4) Andr. 1. 221.

Regularly as a former Will is in Contruction of Law revoked by making a latter Will: so also may a former Devise be overthrown by making a subsequent Devise either in the same or a latter Will, if they are so repugnant to each other, that both cannot consist together; and therefore if a man devise *Long Acre* in Fee, or his *White Horse* (having but one of each) to *A. B.* And after by the same or another Will doth devise the same to *C. D.* This latter Devise will overthrow the former (5). Otherwise, where there is a possibility of Consistency and not any direct Repugnancy; and therefore a Man may devise his Lands to one and his Heirs, and after by the same Will devise a Rent out of the same to another and his Heirs; or may devise several Estates of the same Land, as to one for life, to another the same in Fee after that life (6).

(5) Co. on Lit. 112. 3. 94. 6. 33. Plow. 540.

(6) Cro. 1. 116, 17. 37. Moor's Case. 589.

If a man devise his Land to his Son and Heir in Fee-simple, or to a Stranger for Years, the Remainder to his Son and Heir in Fee-simple, and after the Devisor's Death the Heir refuse the Estate devised him by Will, and claim the Land by descent; by such Refusal by the Heir the Devise to him is made void. But if the Devise were to the Son and Heir in Tail, the Remainder to a Stranger in Fee, in that case the Heir waving the Devise, cannot claim it otherwise than as the Devise, which he wav'd, prescribes and appoints it (7).

(7) Plow. 545. Sed. 596. Dyer. 317. 115.

If a Testator doth receive or release that Debt which was owing to him, and which he had bequeathed to another by his Will, such Receipt or Release is a Countermand and Revocation of that Legacy, whereby it becomes void.

Where a Feme Sole devised Land to a Man, whom she after married and died, It was held, That her Marriage with the Devisee was a Revocation of her Will (8). Notwith-

(8) Co. 4. 61. Goldf. 107.

standing, if she survives her Husband, and dies unmarried, the Devise which by her Will she had made to any other than to her

(1) Plow. 348. Husband, will become good again. (1)

One to whom a Pack of Wool is Bequeathed, which the Testator after converted into Cloth, whereof he died possessor, shall not have the Cloth. (2)

(2) Dodr. Eng. Lawyer 132.

Although where a Legatary dies before the Testator, a Bequest of Goods or Chattels to such Legatee becomes so void that his Executors can have no pretence to them; yet if there be a Devise of Land to one for Life, the Remainder to another in Tail, and the Devisee for Life die before the Testator, the Devise of the Remainder continues good. (3)

(3) Perk. Sect. 557, 568.

If a Devise of Lands or Goods be made to the Wife of such a person by Name, as *A. B.* who after dies, and she marries with another man, and in the life-time of the Devisor becomes the Wife of *C. D.* and after the Devisor dies without any alteration or reaffirmance of his Will; In this case and notwithstanding these Accidents, this Devise holds good. (4)

(4) Plow. 344.

CHAP. XXVI.

Certain Positions or Assertions of Law for the better understanding of this Subject of Legacies and Devises, with certain mixt Cases touching the same.

1. IF the words of the Legacy be doubtful or ambiguous, the motive inducing the Testator, or the cause of the Legacy is specially to be inspected. (a)
2. In Cases doubtful, whether the Legacy be given absolutely or conditionally, it shall be presumed as Pure, Simple and Absolute, rather than Conditional. (b)
3. In a Legacy doubtful as to its value, for want of some discriminating description thereof by the Testator, that which is of the least value, belongs to the Legatary. (c)
4. Likewise in all dubious Legacies, as to the Quantity thereof, the least is generally to be understood. (d)
5. A doubtful Legacy relating to Goods, shall be understood of such only as the Testator had at the making of the Testament, for the clearing whereof, the Law casts the *onus probandi* on the Legatary. (e)
6. Where the doubt arises from the Testators words, the ambiguity shall be interpreted in favour of the Legatary. (f)
7. In the Interpretation of Legacies, the common usage of Speech is more to be considered, than the exact propriety of the words. (g)
8. Also the Testators sense and meaning is more to be considered than his words. (h)
9. The Testators words are to be understood rather as he thought, than as he spake or writ, that is, the effect of the Testament is guided, governed and over-ruled more by the Testators opinion, than as things are in themselves. (i)
10. When the Testators words of bequeathing seem to interfere one with another, the latter words shall for the most part prevail. (k) Yet not always so; there are some Cases wherein *Contrarium verum est*: (l)
11. When the Testators mind and meaning is not as intelligible as it should be, holds his words before the Glass of the Law to make it as visible as it may be; the Law is the best, and indeed the only Interpreter in all such Cases.

(a) Rub. in l. uxorem. ff. de Legat. 3.
(b) Gloss. min. lit. b. in § cum ita, l. ut hæred. ff. de Legat. 2.
(c) L. si ita sit. & gloss. ibid. ff. de Legat. 1.
(d) L. qui concubinam § cum ita Legat. ff. de Legat. 3.
(e) L. si ita. ff. de aur. & arg. leg. & Bald. in l. ult. § ult. nu. 2. vers. item si Test. C. de appel.
(f) Mantie. de Conject. ult. Vol. 1. 7. tit. 1. nu. 32.
(g) Anchor. q. 62. lib. 3. nu. 6.
(h) Gloss. in l. fundo ff. de adim. legat.
(i) Gloss. min. lit. a. in l. quo loco ff. de hæred. Instit.
(k) Gloss. min. lit. f. l. si mihi & tibi ff. de Leg. 1.
(l) Gloss. mag. lit. a. nam & cum in di. l.

12. An imperfect Speech in bequeathing a Legacy may be reduced to such as is equivalent to that which is perfect, if the Testators mind and meaning may rationally be presumed (*m*). For instance, The Testator saith, [*Let 100 l. to A. B.*] without the words [*Be given.*]
- (*m*) L. si in Test. ff. de Legat. 1.
- (*n*) Luxorem § 13. Words of the Present Tense used in the Form of a Devise, are ever to be limited to the time of making the Testament. (*n*)
- (*o*) Rub in lpa- on ; and a Devise may be as well infer'd from the Testators intention, as from his verbal Disposition (*o*).
 Legat. 3.
- (*p*) L. ibid. §. vicos 33. ff. de Legat. 2.
14. A Legacy may pass by Implication, as well as by expressi-
 on ; and a Devise may be as well infer'd from the Testators in-
 ter filium. ff. de tention, as from his verbal Disposition (*o*).
 Legat. 3.
15. A Bequest is good, albeit the Quality or Description of the thing bequeathed (which the Testator had said in his Will he would there insert) be omitted, provided the thing bequeathed be not left at uncertainties (*p*).
- (*q*) Dict l. cum. pater. § 24. ff. de Legat. 2.
16. Words spoken by a Testator by way of Counsel, annexed unto, or interwoven with words bequeathing a Legacy, do not import any Condition as thence charging the Legatary there- with (*q*).
- (*r*) Bart. in dict. l. ff. de leg. 3.
17. A Condition of Non-alienation annexed to a Devise, is not to be extended to such an Alienation, as is absolutely necessary and unavoidable, but only to such as is merely voluntary (*r*).
- (*s*) L. hæc verba & gloss. ibid. ff. de Legat. 1.
- (*t*) L. Stichum. ff. de Legat. 1.
- (*u*) L. cum pecunia § quod ita. & gloss. min. & Bart. ibid. ff. de Legat. 2.
- (*w*) Inst. de hæred. just. § impossibilis. & gloss. in §. in Testam. l. ab omnib. ff. de leg. 1.
- (*x*) C. de ead. rollend § sin autem & gloss. min. l. miles ff. de Legat. 2.
- (*y*) L. si quis ita. ff. de hæred. inst.
- (*z*) L. si legatum pure & l. legatum inutiliter. ff. de adim. Leg.
18. A necessary Condition annexed to a Legacy, doth not make it conditional ; as if the Testator having appointed *A. B.* his Executor, shall after say, *I give 7. G. 100 l. if A. B. be my Executor* (*s*).
19. Pronouns Relative (as Who, Which, or the like) joyned with a word of the Future Tense, in a Bequest, do imply a Condition ; as thus, The Testator saith, [*That A. B. who shall be my Executor when I die, shall give C. D. 100 l.*] which is, as if he had said, [*If A. B. be my Executor, he shall give C. D. 100 l.*] (*t*)
20. Likewise a day uncertain set for the payment of a Legacy, makes it a conditional Legacy (*u*).
21. An impossible Condition imposed upon a Legatary, shall not hurt him in his Legacy (*w*) ; albeit the Testator thought it possible. *L. Servo ff. Cond. Ind.*
22. A Legatary cannot transfer his Legacy, if he die depending the Condition (*x*).
23. That Condition needs no Expectation, whose Event hath no operation (*y*).
24. A Legacy taken away under a Condition, is understood as given under the contrary Condition (*z*). As if the Testator saith, [*A. B. shall not have 100 l. if my Ship which I expect home, should*

should chance to perish in the Sea.] In this Case *A. B.* shall have 100 *l.* if that Ship shall safe arrive.

25. The Legataries Legacy is not transmissible to his Executors, if he die before the accomplishment of the Condition thereunto annexed (*a*). (*a*) L. intercidit ff. de cond. & demon.

26. Every Condition relating to a Legacy, ought to be understood so, as may admit a possibility of both Existence and Non-existence (*b*). (*b*) L. ex fide §. ult. ff. ad Treb.

27. To find out the mind of the Testator, and to reach at the very truth of the meaning, respect must be had rather to the time of his making the Testament, than to the time of his death (*c*). (*c*) Roman. in Authen. similiter nu. 93. in fin. ad l. Falcid.

28. The Testators meaning in all probability, is best interpretable by reflecting on his usual mode, and common custom of speaking (*d*). (*d*) L. si servus pium §. ult. ff. de Legat. 1.

29. All Dispositions made by a Testator, must be understood under the Qualification of *Rebus sic stantibus* (*e*). (*e*) Bart. in l. quoties §. fiduo. §. nu. ff. de hæred. Instit.

30. The Testators Will ought to have such due Construction, as may enure rather to the validity than nullity of the Dispositions therein made by him (*f*). (*f*) L. quoties & l. ubi est ff. de reb. dub.

31. To prevent the inutility of such Dispositions made by the Testator, he shall be presum'd (if possibly the Case will bear it) to have in his thoughts what is not contained in his words (*g*). (*g*) Bart. in l. quintus §. 1. n. 3. ff. de aur. & arg. leg.

32. A Legacy of Release or Discharge to Debtors, is not extensive to other than were Debtors at that time when the Testament was made; unless the Testator expressly bequeath it otherwise (*h*). (*h*) L. Aulcius §. 1. ff. de lib. legat. & Fulg. Conf. 37.

33. To the payment of an Annuity bequeathed in a Will, it is sufficient if the last year were but newly begun when the Legatary died (*i*). (*i*) L. a vobis. Rub. ff. de Annis legatis.

34. In Legacies of a perishable nature or quality, that interpretation ought to be made, which may best prevent the destruction or peioration of the thing bequeathed (*k*). (*k*) Gloss. min. lit. c. l. si quis ff. de legat. 1.

35. Impossibility destroys a Legacy. Understand it of such a Moral Impossibility as was such *ab initio*, and not of such as are so by some *Post-fact* of the Exécutor that should pay the same.

36. The Bequest of a Debt to be due at a day yet to come, is good to the Legatary, though the day of payment comes before the day of the Testators death (*l*). (*l*) Gloss. min. lit. c. l. si Creditori ff. de legat. 1.

37. The *onus probandi* doth not lie upon him who hath the Presumption of his side, and such Presumption as is not disproved, or whose contrary is not proved; and therefore if the Testator bequeath the same sum of money more than once to the same

(m) L. plane §. same person, the Legatary, if he would have it twice, must prove
sed si gloss. it was the Testators meaning to have it so.

ibid. verb. Divus

Pius & verb.

ostendatur. &

gloss. min. Lit.

ff. de Legat. 1.

(n) L. cum ser-

vus §. si vero

& gloss. mag. &

min. ibid. ff. de

legat. 1.

(o) L. cetera ff.

cod.

(p) C. de pign.

l. Creditores. &

gloss. in l. Lu-

cius. ff. de

legat. 2.

(q) Bart. in

Rub. & gloss.

min. in §. civi-

bus. l. Lucius.

ff. de legat. 2.

(r) Rub. in l.

Nomen. ff. de

legat. 3.

(f) Gloss. min.

lit. a. in l. ex

facto ff. de hæ-

red. Instir.

(t) Rub. in l.

eum servus. ff.

de adim. leg. &

gloss. ib.

(u) L. illa In-

stir. ff. de hered.

inst.

(w) Dist. gloss.

in l. ex facto.

38. Things not Merchandable are not devisable : Under-
stand it specially of things Sacred or Consecrated. (n) Nor things
joyued to any Edifice, otherwise than as the Edifice it self. (o) In
resemblance to what we hold for Law, when we say, That
things fixed to the Freehold go not to the Executor, but to the
Heir.

39. The Testator may empower the Legatary to assume his
Legacy of his own Authority ; (p) otherwise he may not so do,
but must have it by the Executors delivery.

40. If a Bond or Obligation of a Debt be bequeathed , the
Executor is discharged by delivery of the same to the Legatary,
and by yielding his name and authority for the putting of the
same in Suit in order to a recovery thereof for the Legataries
use ; but is not obliged to make the Debt good to him, in case the
Debtor prove insolvent. (q)

41. In the Bequest of a Bond or Obligation, is comprized
both the principal Debt, and such interest also as is due on the
same. (r)

42. Where there is a limited Executor, and another with him
as universal Co-executor, that other in Construction of Law is
Legatary as well as Executor. (s)

43. A Legacy once extinct by the Testators own Aliena-
tion thereof, though after re-purchased by the Testator, is
never recoverable by the Legatary without due proof of a De-
claration *de novo* of the Testators intention to the same effect. (t)

44. The Testators Will depending on another mans, is no
Will (u)

45. The reason of the Law, That *Prius solvi debet æs alienum
quam Legata.* (w) That Debts must be paid before Legacies,
is, because the one is a necessary duty, the other a voluntary
bounty.

46. If a certain Quantity be twice bequeathed, it is twice
due, unless the Last VVill of the Testator were expressed with an
intent of Ademption of the first. (x) Understand this, when it
is in two distinct VVritings, as in a Testament and a Codi-
cil : For the twice bequeathing to the same person, the same
Quantity in the same VVriting doth not duplicate the Legacy ;
otherwise if it be in two such distinct VVritings as afore-
said. (y)

47. The Testators erroneous Demonstration or Description of
the Bounds, Limits or Situation of Lands devised by him, doth
not prejudice the Devise, provided he be not mistaken in the Land
it self. (z)

(y) Ibid. gloss.

min. lit. 2.

(z) L. patro-

nus. §. Semp-

pro-

nius. gloss.

min. lit. b.

48. The Testator's false Demonstration of the thing bequeathed, doth not hurt the Legacy, so as his intention be evident (a). (a) Inst. de leg. §. huic & gloss.

49. If a Testator bequeath part of his Goods to A. and saith not what part, the Legatary shall have the Moiety of the whole (b). in §. quod si l. si sic legat. ff. de legat. 1.

50. If the Testator saith, I give thee a part of my House, or the like, it is as if he had said, I give thee one half of my House (c). (b) Gloss. in l. si Titius ff. de legat. 3.

51. There falls no more under the Notion of Goods than what the Testator hath clear of his Debts (d). (c) Gloss. de verb. sign. l. nomen. §. portionis & gloss. mag. min. in l. Titius ff. de legat. 1.

52. I give 10 l. to A. and B. they shall have 10 l. between them, not 10 l. each. (e). (d) Gloss. in l. cum autem ff. de legat. 1.

53. If a Man bequeath all his Horses, his Mares are comprized therein (f). (e) L. si quis test. & gloss. ibid. ff. de legat. 1.

54. By a Bequest of Lambs are understood such as are under a year old (g). (f) L. Martianus ff. de legat. 3. & Cal. Lex. verb. Legat.

55. By a Bequest of Cattel do pass all four-footed tame Beasts, that do feed in Herds, Drovers or Flocks or otherwise (h). (g) L. cum quæretur ff. de legat. 3.

56. Although Mares pass (as aforesaid by a Bequest of Horses) yet not *contra*, nor by a Bequest of Geldings. (h) L. Martianus ff. de legat. 3. & Cal. Lex. verb. Legat.

57. Nor by a Bequest of Sheep do Rams or Lambs pass; yet in that Case the Custom of the place is to be observed; for in some places they are reckoned as Sheep as soon as they are shorn; notwithstanding both Rams and Lambs shall pass by a Bequest of a Flock of Sheep (k). (i) L. cum quæretur ff. de legat. 3.

58. By a Bequest of Wooll is understood not only that which is separate from the Skin, but also such as is yet on the Skins of dead Sheep, wash'd or not wash'd, so as it be not yet died, nor designed for some special or particular use (l). (k) L. servis. Sect. Ovium ff. de leg. 3.

59. By a Bequest only of Wooll do pass the Skins also of dead Sheep whereon the Wooll is (m). (l) Rub. & l. si cui lana ff. de leg. 3. & gloss. ibid.

60. By a Bequest of Birds do pass all Poultry, Geese, Pheasants, and all tame or tamed Fowl (n). (m) Dist. 1. Sect. sed an pelles.

61. By a Bequest of Wood or *Lignum*, is only understood Fuel fit for the Fire, not *Silva*, or Trees standing or cut, nor Timber fit for building, which pass by the word (*Materials*) (o). (n) Rub. in dist. 1. si cui lana.

62. By a Bequest of Books are only understood printed Volumes, not clean Paper-books (p). (o) L. ligni & glo. ib. ff. de leg. 3.

63. By a Bequest of Silver will pass Money and Plate, but not the Chest wherein the Silver is (q). (p) L. librorum. & glo. ib. ff. de leg. 3.

64. By a Bequest of a Bond, Obligation or Specialty, doth pass the Debt therein contained, & *vice versa*. (q) L. qui chirographum ff. de legat. 3.

leg. 3. (g) L. argento ff. de legat. 3. (r) L. qui chirographum ff. de legat. 3.

65. When a Testator bequeaths a thing in certain ; but having more of the same kind, which he meant is uncertain : In such case the Executor, and not the Legatary hath the election ; as, when the Testator having but two Horses in all, gives one of them (not saying which) to *A. B.* the Executor, and not he shall have the choice (a).

66. Likewise when the Testator bequeaths any thing real and immoveable in certain, as his Field called *Blackdown*, when he hath two Fields of that Name : In this case also the election belongs to the Executor, to give unto the Devisee which of them he please (b).

67. But when the Legacy is of Generals, or bequeathed in general, as a Horse, an Ox, or the like : In such case the election is the Legatary's, to chuse only in a way of Mediocrity (c). For,

68. When even by the Testator's own words the Law gives the election of the thing bequeathed to the Legatary, it is not intended that he shall chuse that which is the very best for himself and the very worst for the Executor, but shall moderate and regulate his Choice between them both (d).

69. But when the election is doubtful ; as, Whether it doth belong to the Legatary or to the Executor : In that Case the Law in favour of Wills gives it to the Legatary (e).

70. A Legacy left by a Testator to his Parish-Church, who after the making of his Will doth change his Habitation, is due Falcid. per l. si not to the Parish where he died, but where he lived when the Testament was made (f) ; which is yet contradicted, as will speedily appear.

71. The words [*Si, Donec, Quamdiu,*] and the like, used in the Form of a Bequest, though they seem to be of no great Disconsonancy in their import, yet do exceedingly alter the Case according to the Diversity of their genuine Acceptations ; for a Testator's Relick having a Legacy given her of 10 *l. per annum*, if she shall remain a Widow, is obliged to give Caution for Repayment (in case she marry) of what in the interim she shall receive by virtue of that Legacy (g). Otherwise if the words were [*Untill she shall be married, or so long as she shall remain unmarried:*] In both which Cases, she shall only lose it *de futuro*, but not be obliged to repay what she received *de præterito*. (b).

72. It is possible that a Legacy may be good, even where the Form of a Last Will or Testament is not observed ; for a Soldier being abroad in Military Service, wrote home to his Sister, that he should speedily send her a Letter, which he desired and charged her not to open until he were dead. Accordingly soon after he

(a) L. si quis à
lio. §. si quis plu-
res. & Gloss. ibid.
lit. a. verb. Ele-
gerit. ff. de leg.
1.

(b) L. legato
& Gloss. ibid. ff.
de legat. 1.

(c) Dist. 1. lega-
to.

(d) Gloss. mag.
& min. in § si
quis plures. l. si
quis à filio. ff. de
leg. 1.

(e) Gloss. min.
lit. c. in l. qui
duos ff. de leg. 1

(f) Roman. in
Auth. familie.
nu. 93. C. ad l.
Falcid. per l. si not
to the Parish where
he died, but where
he lived when the
Testament was made
(f) ; which is yet
contradicted, as will
speedily appear.

(g) Auth. cui
relic. cum de ind.
w. dai tollend.

(b) L. Filiae ff.
de annuis leg.

he sends her a Letter which she preserves without opening. The Souldier is slain in the Wars. After she opens the Letter, wherein was found written to this effect, That he would give her 100 l. It is a good Legacy to the Sister. This also holds true in private persons; nor is it material whether he be absent or present that thus writes, (a) provided it be *animo Testandi*, and without any Revocation subsequent.

(a) L. miles & gloss. ibid. ff. de legat. 2.

73. There are a few Cases wherein a Legacy is not revocable:

Four especially, 1. When the Testator swears never to revoke it (b). 2. When it tends to Restitution for Goods ill gotten, or wrongfully taken and withheld. 3. When the Testator gives it for the disburthening of his Conscience (c). 4. When the Testator confesseth in the presence of the Legatary accepting it, that he owes him the Sum which he hath bequeathed him (d). There are also that add a Fifth, *viz.* When the Testator himself, in his Life-time delivers the thing bequeathed to the Legatary (e). But this the Law understands more properly as *Donatio inter vivos* than *Legatum*; yet if such Legacy be mentioned in the Testament (as it must be, if the Legatary hath it under that Notion) and such Testament afterwards prove null, that Legacy will be so also: The reason is, because such Delivery thereof by the Testator alters not the Nature of a Legacy, and will be understood to be with an implicit *Referendo* to the Testament it self (f). And whereas it is said, That there are Four Cases especially wherein a Legacy is not revocable, understand it chiefly according to the strict Letter of the Civil and Canon Law, and not according to the Practice in such Cases: For though a Testator having made a Testament should afterwards confirm it by an Oath, and swear that he would never revoke it; yet if he after make a latter Testament, that will revoke it: For the Rules of Law are not to be infring'd by rash Oaths; nor is it any thing less than equal and just, that the Law should preserve her Power of having her own Rules observed, when the Testator had it in his Power to observe his own Oath. Likewise a Legacy by way of Restitution for Goods ill gotten, or wrongfully withheld, is for the Reason aforesaid revocable; as also for that such Restitution might more acceptably to God and Man be made in the Testator's life-time; for having it then in his Power, it should also have been in his first, rather than in his last Will. And whereas it is said, a Legacy bequeathed by a Testator for the disburdening of his Conscience, is irrevocable: The Law, for the Reasons aforesaid, seems to be otherwise; for the Law in practice will not contradict its own Rules, to satisfy any Man's private Conscience, especially when he had it in his own Power to have satisfied it himself according to Law. And lastly, whereas it was said,

(b) M. f. hard. de probat. concl. 359. nu. 8. 19. & l. cum quis decedens §. Codicilis ff. de legat. 3.
(c) Idem Conc. dist. nu. 21.
(d) Alex. Conf. 151. in fin. lib. 2. Conf. & ibi Molinæ & Maffard. ibid.
(e) Aymon. Craver. sup. Rub. de legat. 1. post Bart. Craver. ibid.

That the Testator's Confession in the Legataries presence accepting it, That he owes him the Sum bequeathed him, renders such Legacy irrevocable; if that were Law indeed, it would be in any Testator's power to evade Just Debts by a voluntary Confession of Fained ones; But notwithstanding such Confession in the Testator, and Acceptance in the Legatary, the Testator's Will is Ambulatory to the last, and he may revoke it, and a Legacy cannot legally be accepted as a Legacy till it be a Legacy; and properly it cannot be called a Legacy till the Will be in force by the Testator's Death; Nor is it then any significant Legacy till the Testator's Debts are first satisfied; and therefore though it be legally bequeathed, it cannot be legally accepted until it may be legally paid, for which Reasons such voluntary Confession by the Testator in his Life-time, joyned with the Legatary's present and actual Acceptance seems not to make such Legacy *Irrevocable*.

(a) L. qui Romanæ Sect. Augerius ff. de verb. obl. & l. si cui Sect. Flav. ff. de solutio.

(b) Ibid.

(c) L. si ita leg. Sect. illi si volet ff. de Legat. 1. & l. si ita expressum ff. de Cond. & Dem.

(d) L. unica §. si autem C. de cad. tollend.

(e) Car. Tap. in l. Beneficium ff. de constit. prin.

nu. 17. & l. nec semel §. 1. ff. quando dies Legat. ced.

(f) Pet. Bella. pert in ff. si qui cautio judic. caus. fac. non obtemp. l. si quis post dies nu. 24.

(g) L. cum ita Sect. in fidei commissio ff. de leg. 2. & jo.

Ant. Rubæus i. Sect. quidam recte l. Gallus Aquilius. ff. de Liber. & posth. (b) Gloss. in l. Lucio Titio ff.

74. If the Testator in his Will doth appoint, That whatever he got by Extortion, or any unlawful ways, shall be restored, (without expressing what, or to whom) it signifies nothing, by reason of uncertainty (a); and which indeed is more a Debt than a Legacy (b).

75. A Legacy left to one if he will, the Testator in the Bequest saying expressly, *I give A. B. 100 l. if he will accept of it*: In such Case the Legacy is lost, if the Legatary, knowing thereof, die before he hath declared his Will or Acceptance (c). The reason is, because the Legatary's Will, and consequently the Power of accomplishing the Condition is not transferrable to another. For,

76. The Legatary cannot transmit his Legacy to his Executor, or any other before the Day of Payment thereof come (d).

77. An Annual Legacy, or a Legacy of an Annuity is payable at the beginning of every Year, unless the Testator doth otherwise fix the times of payment (e).

78. A Legacy left at a day uncertain *when* it will be, but certain *that* it will be, is not due unless the day happen in the Legatary's life time (f).

79. A Legacy given by the Testator to his Kindred in general, is due to such as were not of Kin to him at the making of his Will, so as they be of his Kin at his Death (g).

80. In an alternative Legacy, wherein the Executive Words are directed neither to the Executor, nor to the Legatary, as when the Testator saith, [*I give my House or 100 l. to A. B.*] the Election belongs to the Legatary, not to the Executor. (b). The Reason is, because the Law so favours Testaments, as that they shall be interpreted with as extensive a Latitude as possibly may consist with the Testator's Mind and Meaning.

cc Legat. 2. & ibid. Bar. A. berr. Bald. Imola. Paul. Angel. salic. Jass. cum multis aliis.

81. If the Testator saith, [*I bequeath or commit my Estate as well as my Soul to God.*] Whoever hath his Soul, his Parish Church shall have his Estate (a). (a) Bald. in B. pract. tit. de ult. Vol. q. 12. nu. 2.

82. If the Testator in his last Will doth give 100 l. to the Church (without other Description thereof) and had but one Parish Church, it shall be intended of that, if he dwelt in that Parish (b). If he gave it to St. Stephen's Church in such a City, by Name, and none there found so called, it shall be due to the Cathedral (c). If having two Parish Churches, (one where he made his Will, the other where he died) shall say [*I give 100 l. to my Parish Church*] without other Distinction, it shall be due to the Parish Church where he died, if he died an Inhabitant thereof, and would be there buried (d). Otherwise not, say some of the DD. but they are not clear in that Point (e). Being also much divided in their Opinion to which Church the Legacy is due, when the Testator having at the same time (as well when the Testament was made, as when he died) two Parish Churches, his House and Habitation in each, dwelling alike indifferently in each, a reputed Parishioner to each, doth bequeath the said Sum of 100 l. to his Parish Church. To find out the Testator's Intention in a Bequest so circumstantiated, the DD. raised their Conjectures either from the Consideration of the Testator's Choice of the place for his Enterment, as which of these two Parish Churches he desired to be buried in ; or from the consideration of his most frequent Converse, as which of those two Parishes he was personally most conversant in ; or from the consideration of his Affection to the one more than to the other ; and lay the greatest weight upon that where he desired to be buried, as being a Signal of his Affection to that Parish Church more than the other, and accordingly give their Determination herein. And in case there be not sufficient Evidence of his Affection more to the one than to the other, the Law presumes the Legacy for that Parish Church which is the poorest of the two; but if that neither can sufficiently appear, then and in such case the Bishop of the Diocese may gratie which Parish he please, by assigning it the whole Legacy ; or otherwise may divide betwixt them both, as he shall think fit (f). But if the Testator himself nominates the Church, and there be several Churches of the same Name, and no sufficient Evidence which he meant or intended ; in that case the Law presumes he intended that Church which was the poorest of the Name (g). (b) Bart. in l. quæ Conditio cum ita ff. de Cond. & Dem. (c) Panorm. in cap. nos quidem nu. 13. de Testa. & Lapus in Al. leg. 87. nu. 6. & Felin. in c. dilectus col. 1. & Troilus Malverius in Tract. de oblat. par. 4. nu. 3. (d) Jo. Andræ. Gemin. Rom. Anchor. Franc. & Socin. quos refert & sequitur Boer. in q. 176. (e) Menoch. lib. 4. Præ. 114. nu. 6. (f) Tiraq. de jur. primogen. q. 17. nu. 16. & loc. in l. quæ Conditio §. cum ita nu. 4. ff. de Cond. & demon. ubi Menoch. ubi supra nu. 8. (g) Bald. in l. si quis ad declinand. C. de Episc. & Cler. & Angel. in Sec. si quis in nomine id Auth. de Ecclesiis tit. & Anchor. Sec. Salicet. Socin. Legat.

83. When a Testator gives a Legacy to a Man, willing him to live with his Children, the Legacy is extinguish'd upon his not living with them, in case the Legacy were given him for the Childrens sake (b). Otherwise if it were given him for his own & alii. (b) L. illis libert. in fin. ff. de Cond. & Dem. & l. Si in ff. de annis Legat.

(a) Ita post glo. fake, and not for theirs (a). But if it were given him on both Bart. & alin. Respects, viz. for the Love the Testator bore him, and that he
l i C de legat might live with his Children; in that Case the Legacy shall be
& Decii Conf. good to him, albeit he doth not live with them, because then the
601. nu. 3. Favour the Law allows the Legatary, and for prevention of an Ex-
tinguishment of the Legacy, shall turn the Scale, especially if the
(b) Ibid. Dec. Testator had more than an ordinary Affection for him (b)
nu. 4.

84. If the Testator saith, [*I would not have my Executor to hinder A. B. in his Legacy, or in what I have bequeathed to him.*] The Law doth infer, That A. B. shall take the thing bequeathed of his own proper Authority, without expecting the delivery thereof to him by the Executor (c): which holds true, albeit the usual words of bequeathing are omitted. For,

(c) Angel in l. fires nu. 1. ff. de rei vindic.

& Jo. Guter. in l. nemo potest ff. de legat. 1.

(d) L. damnas. esto. ff. de usufruct. legat.

(e) L. conficiuntur. de Codicil.

(f) L. 2. § quando autem ff. de jur. Fisci.

(g) Jo. Guter. in l. nemo potest ff. de legat. 1. nu. 506.

post Bart.

85. In the Constitution of a Legacy it is not necessary the Testator should *in terminis* say, [*I Give, Leave, Will, Devise or Bequeath* ; it is sufficient if he saith, *I would have A. B. to have such a Thing, or let my Executor suffer him to have it or let him see that A. B. have such a Thing*] or any other words of like import (d).

86. He that hath the Letters of Administration *cum Testamento annexo*, is as far forth obliged to pay the Legacies in such Will contained, as if the Will it self had been legally proved (e).

87. If the Legatary be a Person capable of a Legacy at the time of the Testator's death, it is sufficient, albeit he were not so at the time when the Testament was made (f).

88. If a Testator bequeath 100 Bushels of Corn out of his Ground, there is such a Tacit Condition in that Legacy, that if the Ground produce it not the first Year, the Legatary may expect it the next, and so on successively till the Legacy be compleat (g).

(h) Bal. in l. fin. col. 1. C. comdel. & Lanc.

Goulizula in l. 2. ff. de verb. oblig.

(i) Bald. in l. voluntatis in fin. col. ff. de fidei commiss. &

Jo. de Barronibus sup. Rub. C. de se. curd.

Nuper. nu. 31.

89. A Testator saith, (*I give my Physick Books to my Son if hereafter he shall study Physick ; but if he make the Law his Profession, then let him have my Law Books.*) After the Son studies both Law and Physick ; in that Case he shall have the Testator's Books of both Professions (h).

90. A Legacy left by the Husband to the Wife so long as she shall abide and remain in his House, is understood as a Legacy given her so long as she continues in her Widowed Condition (i).

91. If the Husband gives a Legacy to his Wife in this manner, viz. Item, *I bequeath 100 l. to my Wife so long as she remain in my House, and with my Goods for my Child till he come of Age; she loseth her Legacy if in the interim she marry again, and dwell elsewhere with her second Husband* (k).

(k) L. qui concubinam §. uxori ff. de Legat. 3. & Jo. de Barron. ubi supra nu. 32.

91. Legacies and Bequests of a dubious Sense, ought to have such Construction as may render them of use to the Legataries (i). For which Reason, if a Testator bequeaths his *Debts*, he shall be understood to have bequeathed his *Credits* (k). In like manner if he devise his *Wood*, or [*Silver*] it shall be a devise also of his *Fruit* or Proceed thereof, that so the Legatary may have power to cut it down, convert it into *Ligna*, and sell the same; for otherwise the Devise would be nothing worth to the Devisee (l).

93. When the Testator's Sense and Meaning is somewhat dark and cloudy, it may be requisite in some Cases to have due Reflections on, or (as the Phrase now current is) to take their Measures by the Quality of the Legatary; as if the Testator should say, [I allow *A. B.* the use of some of my Horses, until my Executor shall have sold them] In that Case, if *A. B.* be a Farmer, he shall not use his Hunting Horses nor his Coach Horses, but his Cart-Horses, and such only as were employed about his Husbandry Affairs; otherwise & *à contra* if *A. B.* were of a more refined Quality (m).

94. If the Testator saith, I bequeath to *A. B.* whatever Debts are made, contracted and due to me that shall be found at my Decease; *A. B.* shall in that Case have only such Debts as were contracted at that Time when the Testament was made, not such as were afterwards made or contracted: The Reason is, because those latter words, [*which shall be found at my Decease*] are not Augmentative, but Restrictive, as relating to the Words precedent, and therefore ought not to work an Extension of that Legacy, lest a limiting and diminishing Induction should operate an Augmentation (n). For if less Debts were found at the Testator's Death than had been made to him at or before the making of his Will, there could no more pass by this Legacy than such, much less others that were made and contracted afterwards.

95. In like manner, if the Testator bequeath all his Books to *A. B.* after buys many other Books, after makes another Will, wherein he ratifies and confirms the first as to the Legacies therein bequeathed. Even in this Case *A. B.* shall not have the Books bought after the making of the first Testament (o). Because this Confirmation in such latter Will ratifies nothing to any Extension beyond what is adequate to the Legacy bequeathed in the former.

96. But if the Testator shall say, [I give *B.* all I can, or whatever I can out of the Goods and Estates which I have] In such case, whatever shall be afterwards acquired that kind by the Testator, is contained in such Legacy, and shall accrue to *A. B.* (p). Otherwise in case the Testator said limited words of the said Bequest to any certain place (q).

(a) Brechæus in l. 4. ff. de Ver. sign.

(b) Ibid. & l. cum aur. & arg. ff. de aur. & arg. leg. Rei nomen Pecuniam continet, sed non è contra, licet Pecunia rem significat. Res est Genus, Pecunia Species.

(c) Fornerius in l. 264. de vern. fig. in prin. & l. qui filiab. ff. de leg. 1. & l. 5. ff. de Testat. & l. 5. ff. de oper. lib.

(d) Brechæus. ubi supra in l. 264. & l. etiam ff. de usufruct. & l. ætate 8. si interrogatus ff. ne interrogat. act. & glo. in l. ff. Titius ff. de legat. 3.

(e) Brechæus. In Dubio Dimidia debetur l. 3. C. de legat. (f) Accursius in l. uxori. ff. de legat. 3. & Brechæus. ibid.

(g) Fornelius in l. 145. ff. de verb. sign.

(h) L. si greg. ff. de legat. 1.

(i) L. qui chilographum ff. de legat. 3. & l. 1. C. D. don.

(k) Alceat. & Fornel. in l. 206. ff. de verb. sign.

(l) L. 3. de tritic. ff. de vino & oleo. legat.

97. If a Testator saith, [*I bequeath my things to A. B.*] his Money doth pass by that Bequest, because of its Generality; (a) Otherwise if he saith [*I bequeath my Gold and Silver to A. B.*] (b) Because such words are not *Generical* enough to be Monies infallibly current, for a man may have very current Money that is neither Gold nor Silver.

98. A Testator gives 1000 l. to his Daughters, and dies. After his Relict is delivered of another Daughter, by that Husband deceased. That Daughter shall share with the other in 1000 l. (c). Otherwise if the Testator had limited the Legacy to any Number of Legatees, and said, I give 1000 l. to my three Daughters.

99. A Testator saith, [I give a Portion of my Estate, or a Portion of my Goods to A. B.] without expressing specially what Portion. In this case he shall have the one half or Moiety thereof (d).

The same Law in case the Testator had said, [I give A. B. part of my Estate, or I give him part of my Goods.] The Reason is, because a Dimidiety is the most just and equallest part of the whole (e). And the case may so happen, as that *Parts* shall be taken *Legally* in one sense, as well as *Figuratively* in another *pro toto*; as when a Testator bequeaths to his Wife that part of his House he most frequented and used to live in, she shall have in that case not only this or that part of the House, as his Bed-chamber, or the like, but the whole of his Habitation that he made use of with & for his Family (f).

100. If a Legacy be given between thee and a Child in the Womb, and that Child after happen to be dead born, or never born, thou shalt have the whole to thy self, albeit the Testator assigned each one his entire proportion thereof (g).

101. If a Herd of Cattell or a Flock of Sheep be bequeathed, whereof all of each, save one, die, the Legatary shall have that one (h).

102. By the Bequest of Bonds or Specialties, the Debts due or to be due thereon, as also the right of Action for the same, are bequeathed. Likewise by the Devise of a Purchase Deed, the thing purchased, together with all the Testator's Right, Title and Interest to and in the same doth pass to the Devisee (i).

103. A Bequest of Wines doth convey the Vessels wherein they are, to the Legatary, not as if a Man in his Liquor should think (for no man else will) the Vessels were part of the Wines (as Metals of Gold or Silver are part of such Metals) but because the Testator's intention in the Eye of the Law seems to bequeath them as Accessories to the Principal (k); excepting such as by reason of the greatness of their Bulk and wide Capacity, cannot without much difficulty be removed out of the Cellars where they are (l).

105. If a Legacy be given to the Bishop of such a Diocese, without naming him, and he happen to die before the day for payment thereof come, his Successors shall have it; because it is presumed the Testator intended it not to that person so dignified, but to the Dignity it self; (e) and because the Dignity is not, as the Person, Mortal, but Sempervive by Succession. (f) For the same Reason, a Legacy given to a King (who dies before it becomes payable) accreus to the next Successor, because the Regal Authority never dies. (g) Otherwise if the Legacy were given to A. B. (by name) Bishop of D. because then the person, not the Dignity, is the Legatary; the Dignity being mentioned only for distinction.

(e) L. quod principi. ff. de leg. 2. & Bart. Bal. & Cast. inde locum. & Menoch. lib. 5. Praef. 121. nu. 1 & l. annua in fin. ff. de Annis, legat. (f) Glo. in C. quoniam Abbas. de Offic. de leg.

(g) Bald. in Rub. C. de Jur. sic. lib. 10. nu. 14. & §. ult. in Auth. Quomodo oper. Episco.

(h) Brechtius. in l. 38. ff. de verb. sign.

(i) L. non sunt liberi. ff. de stat. hom.

(k) L. quod dicitur. ff. de lib. & posth.

hæ ed. (l) Dist. 1. non sunt liberi.

(m) L. queritur ff. de stat. hom

106. If a Legacy be given to the Child in the Womb, and the birth prove monstrous, that is, very contrary to the common form and shape of Mankind, as with a Crows Beak instead of a Nose, or with the face of an Ass instead of a better, in such an ill favoured Case the Legacy is void. (b) Otherwise if it were born only with some of the less principal members imperfect or supernumerary, as with half a Thumb or two Thumbs, or six Fingers on a hand, or the like, (i) But if the Birth (not accidentally) be imperfect as to its Integrals, or defective as to its more noble and more principal parts and members, as having but one eye, or but one hand, albeit the Creature hath life, the Legacy hath none. (k) For although an Amplification of the natural Form in this Case doth not prejudice, yet a Mutation thereof will. (l) Understand not this as if it did extend to Hermaphrodites: For if they be not in a double capacity as to Legacies as well as other things, yet they are not excluded a single capacity; but in that case it is provided, That that Sex which most prevails with them in nature shall likewise prevail in Law, as to the Legacy bequeathed. (m)

107. To consider a written Testament as compleat, you must notion it under three considerations or degrees, the *Inchoation*, *Progression* and *Consummation* thereof. The *Inchoation* or *Inception* is the writing thereof. The *Progression* is the Publication thereof. (n) And the Testators death is the *Consummation* thereof.

(n) C. sup. Lit. l. 1. 2. 10. Sect. 167.

108. The same words that will convey Land by Deed, will serve to convey Land by Will: but not *à contra*.

109. The Devisors Heir may enter and take the profits of Lands devised, until the Devisee enter, in case he delays the Execution of the Devise. (o)

(o) Leon. 2. 190.

110. A Will ought to be so interpreted, as that no word shall have any violence nor repugnancy. (p)

(p) Hill. 13 Jac. B. R.

111. A Devise takes effect before a Descent, because the Devisee is in by Act executed in the Devisors life-time, (q) though it be not consummated till his death.

Blanford. verf. Blanford. Roll. Rep.

(q) Anderf.

(r) Anderf. 2. 112. Where the Testators intention may be known by the words
134. 10. 11. in his Will, there all the words are to be carried to answer his intent. (r)

113. In the right Construction of Wills, the Testators intention weighs heavier in judgment than his words; which though by a favourable Construction are to be accommodated to the Testators mind and intent as nigh as may be; yet so, as that his intent may consist with Law: And as such intent is not to be repugnant to the Rules of Law, so the words (whence such intent is colligible) must be all the words of the Will, and not only one part of them; and such as have such a consistency throughout *Conjunctim*, as cannot be justly charged with a palpable incongruity or self-contradiction. (s)

(s) Bolstr. 2.
126.
Lane 118.
Cro. fol. 67.
Love's vers.
Goddard. &
fol. 372. &
415

114. Estates real and personal may be convey'd, and pass by a Will and Testament, without Livery and Seisin, Attornment or Delivery.

115. Devises ought to be so construed, as may be in favour and not to the prejudice of the Devisees. (t)

(t) Co. 6. 16.
(u) Co. 8. 96.

116. By Will a man may Create an Interest at his Death, which by Grant or Conveyance he could not do in the time of his life. (u)

117. A Will advisedly made, may not upon doubtful speeches be revoked. (w)

(w) Cro. 3.
51. 52.

118. Where the same person is both Executor and Legatary, the Law gives him his election to take by which Right or Title he pleases: But if by some special Act he hath determined his election as to the one, he may not after take by the other: And if it appears not by which right he takes, the Law will presume he takes it as Executor, not as Legatary. (x)

(x) Co. 10. 47.
Plov. 519.

119. A Devise of Land by one to his own Heir, is a void Devise; because he gives but what the Law had given before. (y)

543. Dyer 277.
(y) Styles 148.
149.

120. Out of the words of the Will, and not by any Averment, must the Construction of a Will be gathered. (z)

(z) Co. 5. 67.
(a) Co. sup. Lit
211. Perk. Sect.
570. Plov. 511.

121. A Devise of any Chattel real or personal, taking the Devise without the Executors consent or delivery, is liable to an Action of Trespass at the Suit of the Executor. (a)

(b) Cro. 3. 476.
Ewer vers.
Heyden.

122. The intent of a Devisor, may alter the very nature of words in a Will, as Land, &c. and restrain it only to arable Lands, &c. and exclude Houses, Woods, &c. (b)

(c) Cro. 1. 122.
Jonsson vers.
Gabriel & al.

123. A Devise of Land to one when he comes to the age of 21 years, is good: And if he levy a fine of it before he comes of age, he bars himself of it. (c)

(d) Leon. 1.
156.
(e) Rob 59.

124. A Devise of Land to one, to do therewith according to his discretion, or at his discretion, is a good Devise, and makes a Fee-simple: (d) So also where it is devised to sell at his pleasure. (e)

(f) Cro. 1. 478.
Abraham vers.
Twigg 407.
21. 98. Bacon
vers. Hull.

125. A Devise of Land to J. S. and his Heirs males lawfully engendred, is a Fee simple. (f)

126. *A.* deviseth to his two Daughters his Heirs, to them and their Heirs, his Land : They shall be by this Joynt-tenants. (g) Cro. 1. 101. 411. 30.
127. One may not devise a Rent, or Common, or other profit, out of another mans Land. (h) Perk. Sect. 538. Lit. Sect. 585. Dyer. 53. 140. E. N. B. 121. Co. 3 33. 3. 33. on Lit. 111.
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130. If a Rent be granted to one for the life of another, he cannot (it seems) devise this, but the Tenant will have it as an Occupant (l) (i) More, Case 798. Case Kings-well & Cowdr. (k) Hob. 80. (l) Dyer 353. (m) 1yer 5. 164.
131. If a Testator bequeath a moiety of his Goods and Chattels real and personal, the Legatary shall have a moiety of them as they are at the Testators death, if his Executor hath Assets to pay his Debts. (m) (n) Cro. 796. Woodcock verf. Woodcock.
132. A Devise of a Term of years to one, the Remainder to another is void as to the Remainder. (n) (o) Perk. Sect. 517.
133. Causes of Action altogether uncertain, such as may refer to a taking away the Testators Goods, or to matters merely of Accompt, or the like, are not devisable. (o) (p) Cro. 3. 37. Crips. verf. Gri-till.
134. A Devise of all a mans Goods and Mortgages to his Executors, is a good Devise, and will pass the Land mortgaged. (p) (q) Cro. 2. 144.
135. A Feoffment to Uses without any Livery, but confirmed by Will, is a good Devise. (q)
136. An Estate may not be created by Will, so as that part thereof shall determine by a Condition, and the rest be continued ; this being repugnant to Law.
137. A man cannot (for the same reason) devise Lands to one in Fee ; and if that he do not such a thing, that the Land shall remain to another. (r) (r) Dyer 12.
138. A man cannot devise his Land in this manner ; viz. I devise my Land to *A. B.* and his Heirs: And if he die without Heirs, then my Will is, That it shall remain to *C. D.* for a man cannot be presumed to die without Heir. (s) (s) Vid. Coke 1. 1. 104.
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- Will together ; and therefore the words are not to be taken by parcels, but all intirely together ; and so they are to be taken in a benign in a favourable Construction, as nigh as may be to the Testators mind ; yet so withal, as that they may stand with the Rules of Law, that there be no Contrarieties, nor any other thing in vain, or idle therein : (w) And that such intent of the Testator must be expressed in the Will, and not be supplied by Averment of any foreign

- (*) Co. 8. 95. foreign or matter: which intent must also be clear, and not dubious. (x)
- (y) Yelv. 210. 141. A Devise in one on the same Will of all a mans Lands first to A. and after to B. creates a Joynt-tenancy in all the Lands. (y)
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- (f) Co. 8. part. 126. 149. A Remainder cannot be limited after a Fee. (g)
135. Sir Jo. Needhams Case. 150. To conclude. These Testamentary Cases are regularly admitted into as much favour with the Law, as will possibly consist with Equity; inasmuch, as the Law allows, That *opinio, quæ favet Testamento, semper est tenenda*. (b) The reason is, *Quia Testamenta conservari illata, interest, Rei-publicæ*. (i) And therefore, although a mans Last-Will be said to be Ambulatory so long as he lives; yet after his decease (if it be what the Law calls *Iusta voluntas*;) it ought (like the Royal Decrees of the *Modes* and *Persians*) to be held inviolable and unalterable, notwithstanding what that famous Italian Advocate of *Placentia* *Johannes Gutterius* asserts, That *Nemo præter Papam potest alterare voluntates Testatorum*. (k) Which Assertion, (if it were true) would by the Subversion of Properties, reduce the Papal part of the whole World to its primitive Chaos of Confusion.
- (g) H. 8. Dyer 33. (h) L. si pars ff. de inoff. Testa. (i) L. vel negare ff. quem admodum Testa. ap. (k) Jo. Gutterius, in L. nemo potest, ff. de leg. 1.

*Αφθάρτη βασιλεῖ (πάντ) ἐξ ὧς Θεῶ.

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